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No. 88-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL W. STERNMAN
(*Counsel of Record*)

AUDRY WEINTROB
ROSENMAN & COLIN
575 Madison Avenue
New York, New York 10022
(212) 940-8800

Attorneys for Petitioner
Herman Soifer

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that any person injured in fact had standing to assert a civil claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), and in reversing the dismissal of a RICO complaint by a creditor against the officers of a corporation subject to a pending bankruptcy proceeding for damages attributable to the depletion of the corporation's assets?

2. Did the Court of Appeals, in applying the rule of separate accrual to govern the period of limitations applicable to RICO claims, err in holding that the period does not begin to run until the termination of other proceedings which may reduce the damages recoverable in a RICO action and in directing that the dismissal of a creditor's RICO action filed more than six years after the creditor first sought relief in a bankruptcy proceeding for the same wrongdoing be without prejudice to the filing of a new action by the creditor after the termination of the bankruptcy proceeding?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioner Herman Soifer and the respondents Bankers Trust Company, Daniel Rhoades and Milton Braten. In the Court below, Soifer, Rhoades and Braten were appellees and Bankers the appellant.

Petitioner has no parent companies, subsidiaries or affiliates, as those terms are used in Supreme Court Rule 28.1.

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IN THE

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HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Herman Soifer respectfully prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit which reversed a judgment of the United States District Court for the Southern District of New York dismissing this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-25a)[1] is reported at 859 F.2d 1096 (1988). The opinions of the United States District Court for the Southern District of New York dismissing the complaint are reported at 676 F. Supp. 496 (S.D.N.Y. 1987) (App. 27a-40a) and 648 F. Supp. 17 (S.D.N.Y. 1986) (App. 41a-75a).

1 References to "App." are to the Appendix submitted with this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1988 (App. 26a-1-26a-2). Soifer's petition for rehearing and suggestion for rehearing *en banc* was denied by order entered November 14, 1988 (App. 26a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provisions involved in this proceeding are relevant portions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title IX of the Organized Crime Control Act of 1970, as amended, 18 U.S.C. §§ 1961-1964 (1978) (App. 76a-88a).

STATEMENT OF THE CASE

Respondent Bankers Trust Company ("Bankers"), one of many creditors of Braten Apparel Corp. ("BAC"), charges that in August 1974, various individuals caused BAC to file a bankruptcy proceeding during which they fraudulently concealed its ownership of Brookfield Clothes, Inc. ("Brookfield"), an asset worth in excess of $3 million. Bankers asserts that in March 1976, the creditors of BAC were induced to accept a plan of arrangement under which they would have received only 17.5% of their allowed claims and BAC would have been relieved of more than $4.3 million in debts. By September 1976, after it became aware of the alleged concealment, Bankers moved in the bankruptcy court to revoke BAC's plan, alleging that it had been procured by fraud. In June 1982, the bankruptcy court revoked the plan and reinstated the bankruptcy proceeding which, as of this date, remains pending.

Bankers commenced this RICO action in August 1982, bypassing the bankruptcy proceeding in which it had litigated essentially the same claims for the prior six years. In addition to asserting claims concerning the Brookfield concealment, Bankers also sought to recover more than $100,000 in legal fees

which it claimed to have incurred in defending frivolous lawsuits and asserted that, as a result of certain conveyances in 1981-82, funds which might have been used to pay the wrongfully discharged portion of Bankers' debt had been fraudulently transferred. 859 F.2d at 1099, 1106; App. 6a, 20a.

In 1983, the District Court entered a judgment dismissing the complaint for failure to state a claim, holding that the civil provisions of RICO provide relief only for a "distinct RICO injury" caused by a pattern of racketeering activity rather than by the predicate acts that constitute the pattern. 566 F. Supp. 1235. In 1984, the Second Circuit affirmed that dismissal. 741 F.2d 511. In 1985, this Court vacated that judgment in light of *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985) and remanded for further proceedings. 473 U.S. 922.

In 1986, following that remand, the District Court dismissed most of the claims against Soifer on limitations grounds. It did not dismiss Bankers' conspiracy claim, finding that the action was timely in this regard. 648 F. Supp. at 37; App. 71a. In 1987, it dismissed the entire action on the ground that Bankers had no standing under RICO to pursue claims arising from the discharge of its debt and that, insofar as Bankers had standing to pursue claims for legal fees, its claim was time-barred. 676 F. Supp. at 503, 504; App. 35a, 37a.

In 1988, the Second Circuit reversed. 859 F.2d at 1098; App. 3a.[2] As to standing, it held that any person injured in fact may sue under RICO even though that person would have no standing to pursue an action under other applicable statutory or common law. *Id.* at 1100-01; App. 8a-11a. As to limitations, it adopted a so-called rule of separate accrual under which "each time a plaintiff suffers an injury caused by a violation of 18 U.S.C. § 1962, a cause of action accrues to the plaintiff at the time he discovered or should have discovered the injury." *Id.* at 1102; App. 13a. In applying that rule, it held that where dam-

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2 The Second Circuit (859 F.2d at 1105-06; App. 20a-23a) characterized the claim that a portion of Bankers' debt had been wrongfully discharged in 1976 as the "loss of a legitimate debt" claim; the claim that Bankers had incurred legal expenses for which it should be reimbursed as the "past legal fees" claim; and the claim for additional funds which Bankers might expend to trace lost assets as the "future injury" claim.

ages "are 'unrecoverable' . . . because 'their accrual is speculative' and 'their amount and nature unprovable'," no claim will accrue therefor and, at such future time as "the damages do become definite, a claim will accrue, and plaintiff will have four years to bring an action for recovery." *Id.* at 1106; App. 21a-22a.

SUMMARY OF ARGUMENT

Bankers' loss of a legitimate debt claim belongs to BAC. Unless the bankruptcy court otherwise orders, neither Bankers nor any other creditor of BAC may pursue, on its own behalf, the right to secure payment of any indebtedness owed by BAC. The Court below incorrectly conferred standing on Bankers to pursue its RICO claim.

Even if Bankers had standing to pursue its loss of a legitimate debt claim, its dismissal with prejudice should have been affirmed. That claim is time-barred, and the pendency of the BAC bankruptcy proceeding did not render that claim speculative and unprovable so as to warrant the deferral of its accrual until the termination of that proceeding.

REASONS FOR GRANTING THE WRIT

I. THE CONFLICT BETWEEN THE SECOND CIRCUIT AND THE FIFTH AND SEVENTH CIRCUITS AS TO WHETHER STANDING LIMITATIONS APPLY TO RICO PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT WAS INCORRECTLY DECIDED BELOW

In its decision, the Second Circuit refused to impose any meaningful standing limitations on RICO claims. In its view, any person "injur[ed] in fact" may sue under RICO even though that person would have no standing to pursue an action under other applicable provisions of statutory or common law. As applied here, this injury in fact principle improperly enables a creditor to bring a civil RICO action against the officers of a

corporation for injuries sustained as a result of the depletion of the corporation's assets. 859 F.2d at 1101; App. 9a-10a.

A. Traditional Standing Limitations Are Applicable To RICO

Most Circuits consistently apply standing limitations in affirming the dismissal of RICO claims.[3] Thus, *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985), rejected the standing of a taxpayer to seek relief under RICO for harm arising from payment of increased taxes due to defendant's fraud on the taxing authorities. *Carter* supports the proposition that an indirectly injured party must look to the recovery of the directly injured party, not to the wrongdoer, for relief. *Accord*, *NCNB National Bank v. Tiller*, 814 F.2d 931, 937 (4th Cir. 1987).

In *Bass v. Campagnone*, 838 F.2d 10 (1st Cir. 1988), members of a labor union claimed deprivation of effective representation because of the corruption of certain union officials. The First Circuit held that the inquiry is whether plaintiff "has alleged an injury that 'flows from' the predicate acts." *Id.* at 12 (*quoting Sedima*, 473 U.S. at 497). Noting that plaintiffs alleged no injury peculiar to them which did not fall equally upon other union members, the Court held that the union was the only appropriate plaintiff. *Id.* at 13.

Adams-Lundy v. Association of Prof. Flight Attendants, 844 F.2d 245 (5th Cir. 1988) (*per curiam*), involved a claim by a majority of the members of a labor union's board. After they

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3 Contrary to the view of the Court below (859 F.2d at 1100; App. 9a), nothing in *Sedima*, 473 U.S. at 497, may be read to support the conclusion that standing to assert civil claims under RICO may not be limited. *Sedima* did not address whether all parties claiming some injury from the same acts may seek relief under RICO. *Sedima* concerned whether any party could sue for an "injury resulting from the predicate acts themselves." 473 U.S. at 494. As stated in *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153-54 (4th Cir. 1987) (holding that a corporation which neither bought nor sold securities had no standing to bring a RICO claim based on securities fraud):

> [T]he application [to RICO claims] of traditional standing requirements for securities fraud does not violate [*Sedima*'s rejection of] an across-the-board standing restriction, derived from the antitrust laws, that would apply to RICO claims no matter what the predicate offenses.

had been suspended by the board's minority members, they brought an action under RICO alleging various financial improprieties. The Fifth Circuit assumed that the board members' claims were correctly analogized to claims by stockholders and, rejecting the argument that *Sedima* mandates unlimited standing, held that plaintiffs lacked standing because defendants' alleged wrongs "directly injured solely the union." *Id.* at 250 & n. 32.

In *Leach v. Federal Deposit Insurance Corp.*, 860 F.2d 1266, 1273-74 (5th Cir. 1988), the Fifth Circuit held that minority shareholders of a bank had no standing to assert RICO claims for the diminution of the value of their shares arising from mismanagement of the Bank's affairs by the defendant directors. It noted that its decision was consistent with *Adams-Lundy* as well as with *Crocker v. Federal Deposit Insurance Corp.*, 826 F.2d 347 (5th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1075 (1988) (holding that "minority shareholders lacked standing under RICO to sue because they had not alleged any injury to their property that was distinct from any injury the corporation may have suffered").[4] *See also Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 29-30 (1st Cir. 1987) (RICO class action by purchaser "not the proper vehicle for shareholders to obtain redress" for injury to corporation) and *Sparling v.*

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4 As noted in *Leach* (860 F.2d at 1274 n. 15), its holding was consistent with *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 845 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986). *Rand* recognized that RICO, like the antitrust laws, is subject to standing limitations, even though neither contains any statutory standing requirements. In *Rand*, stockholders alleged that a creditor had wrongfully forced their corporation into bankruptcy. In holding that plaintiffs lacked standing to seek relief under the Sherman Act and under RICO, the Second Circuit relied upon a case where

> as in the instant case, a stockholder/creditor sued under the antitrust laws, alleging that his stock was rendered worthless and that his claim against the company was only partially satisfied because defendants' alleged antitrust violation drove the company into bankruptcy. 794 F.2d at 849.

The Court below concluded that the rationale of *Rand* was not applicable here because Bankers was a creditor, and not a stockholder, of BAC. 859 F.2d at 1101; App. 10a.

Hoffman Construction Co., 1988 WL 135641, 8-9 (9th Cir. Dec. 21, 1988).

In *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987), the Eleventh Circuit affirmed the dismissal of a RICO claim on the ground that plaintiff's alleged injuries were not personally sustained by him but were sustained derivatively as a shareholder of a corporation that relied on statements claimed to have been wrongfully issued.

Standing limitations have also been imposed to support dismissal of RICO claims by discharged employees. In *Cullom v. Hibernia National Bank*, 859 F.2d 1211 (5th Cir. 1988), the Fifth Circuit held that "an employee discharged for refusing to participate in an illegal activity under RICO lacks standing to sue" because his "injury was not 'by reason of' or did not 'flow from' the commission of the predicate acts on which the RICO violation was based." *Id.* at 1212. In so doing, it relied on analogous decisions in other circuits under which "[w]histleblowers do not have standing to sue under RICO for the injury caused by the loss of their job." *Id.* at 1215, citing *Pujol v. Shearson/Am. Express, Inc.*, 829 F.2d 1201, 1204-06 (1st Cir. 1987) (affirming dismissal of RICO claim by discharged employee for lack of standing "because of the absence of the requisite connection between the injuries alleged and the 'predicate acts' pleaded in the complaint"); *Nodine v. Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987) (affirming dismissal of RICO claim by discharged employee for lack of standing because no injury that resulted from the predicate offenses alleged); and *Morast v. Lance*, 807 F.2d 926, 932-33 (11th Cir. 1987).[5]

B. A Creditor Has No Right To Pursue Its Own Action During A Pending Bankruptcy Proceeding

Traditional standing limitations act to bar a creditor from pursuing its own action during a pending bankruptcy proceeding. In *In re MortgageAmerica Corp.*, 714 F.2d 1266 (5th Cir. 1983), the Fifth Circuit held that even though state law specifi-

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5 See also *Burdick v. American Express Co.*, No. 88-7216 (2d Cir. Jan. 13, 1989), and *Diamond v. Reynolds*, 853 F.2d 917 (3d Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 392 (1988).

cally provides that a lender may seek to recover assets improperly removed from a corporation, once the corporation subsequently becomes subject to a bankruptcy proceeding, the bankruptcy laws place that right exclusively in the hands of its trustee.

In that case, a bank had claimed that it was the specific target of a self-dealing transfer of assets by the corporate debtor's sole shareholder; the purpose of the transfer was to prevent enforcement by the bank of a judgment against the corporation. The bank advanced three theories to demonstrate why its claim against the shareholder could proceed despite the bankruptcy: (i) a creditor could sue a corporate officer for breach of trust to the creditors; (ii) an officer could be held liable for denuding the corporation of its assets; and (iii) fraudulently conveyed assets could be traced into the hands of the recipient.

The Fifth Circuit rejected the bank's contentions that these were merely private claims of a creditor to recover for fraud. It held that each of the bank's claims, however denominated, could be asserted only by a bankruptcy trustee in a proceeding for the benefit of all creditors. It stated:

> [T]his result furthers the basic, commonsense principle of pro-rata distribution that runs through virtually every substantive provision of the Code. At least in modern bankruptcy law, the day of unfair and unseemly races to the courthouse is long gone. Whatever else may be uncertain or unsettled in the construction of the new Bankruptcy Code, we think it beyond cavil that the principle of first-come-first-served has no place in bankruptcy law except to the very limited extent that specific provisions give it a place. 714 F.2d at 1278.

See also 676 F. Supp. at 501 (App. 32a-33a) and *In re S.I. Acquisition, Inc.*, 817 F.2d 1142, 1153-54 (5th Cir. 1987).

Similarly, in *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1077 (1988), plaintiffs, customers of a bankrupt oil refinery, sought a declaratory judgment that the member-owners of the refinery were liable for its debts under

an alter ego theory. In agreeing that plaintiffs lacked standing, the Seventh Circuit stated that "[t]he trustee represents not only the rights of the debtor but also the interests of the creditors of the debtor," with the sole right to pursue the claims of creditors collectively. This device is intended to "eliminate[ ] the many wasteful and competitive suits of individual creditors." *Id.* at 1342. The claims which pass to the trustee are precisely those where "the liability is to all creditors of the corporation without regard to the[ir] personal dealings." *Id.* at 1349.

The rationales of *MortgageAmerica* and *Koch* have their origins in principles recognized by courts for many decades. In the *Gochenour* cases,[6] creditors of a bankrupt corporation alleged in two separate class actions that corporate insiders had acquired the debtor's assets at a discount. One complaint alleged waste and mismanagement of the corporation; the other alleged a scheme directed at defrauding the creditors. Both actions were dismissed because, once the corporation had become subject to a bankruptcy proceeding, the creditors had no standing. At such point, any claim which, in essence, arose from a diversion of corporate assets, however denominated, belonged to the bankruptcy trustee or, in the absence of a trustee, to the debtor-in-possession. Whether acting individually or as a class, creditors had no right to pursue an independent action without express authorization from the bankruptcy court.

Few exceptions exist to the rule of no independent creditor standing. Of these, all but one require the creditor to secure permission from the bankruptcy court prior to commencing its

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6 *Gochenour v. George & Francis Ball Foundation*, 35 F. Supp. 508 (S.D. Ind. 1940), *aff'd and the opinion adopted by reference as the opinion of the Court of Appeals*, 117 F.2d 259 (7th Cir.) (*per curiam*), *cert. denied*, 313 U.S. 566 (1941). *Accord Gochenour v. Cleveland Terminals Bldg. Co.*, 118 F.2d 89 (6th Cir. 1941) (creditors' claims belonged to debtor-in-possession and were under the exclusive jurisdiction of the bankruptcy court). *See also Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910) (Sherman Act does not confer standing on shareholders and creditors of company injured by antitrust violation), cited in 676 F. Supp. at 500; App. 30a-31a.

own action.[7] Only a creditor claiming fraudulent inducement can sue in its own right without bankruptcy court permission. *See, e.g., Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037 (2d Cir.), *cert. denied*, 479 U.S. 950 (1986) (plaintiff charged principals of a bankrupt company with conspiring to induce it to enter a contract with the company at a time when they planned to remove the company's assets, thereby destroying its ability to perform the contract);[8] *Teledyne Industries, Inc. v. Eon Corp.*, 401 F. Supp. 729 (S.D.N.Y. 1975), *aff'd on the opinion below*, 546 F.2d 495 (2d Cir. 1976) (plaintiff alleged that controlling persons of a debtor had fraudulently induced it to enter a contract which they knew the debtor could not perform).[9]

C. The Fifth and Seventh Circuits Properly Bar RICO Claims By A Creditor Of A Company Subject To A Pending Bankruptcy Proceeding

Applying the principles set forth above, most courts which have considered the issue bar RICO claims by creditors during a pending bankruptcy proceeding. Thus, in *National Enterprises, Inc. v. Mellon Fin. Serv. Corp. No. 7*, 847 F.2d 251 (5th Cir. 1988)—a case which, in many pertinent respects, is similar to

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7 Thus, a creditor must seek permission of the bankruptcy court to require the trustee or debtor-in-possession to abandon a claim, or to bring an action for itself or for the benefit of all creditors. *See, e.g., Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129, 132 (2d Cir. 1984), citing *Dallas Cabana, Inc. v. Hyatt Corp.*, 441 F.2d 865, 868 (5th Cir. 1971); *see also Nebraska State Bank v. Jones*, 846 F.2d 477 (8th Cir. 1988) (affirming dismissal of creditor's action and noting right of creditor to move in bankruptcy court to appoint a trustee, convert a reorganization case to a liquidation case, or to compel debtor-in-possession to act or to authorize creditor to institute its own action); *Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988) and 676 F. Supp. at 503; App. 35a.

8 The District Court distinguished *Cumberland*, noting that there "every creditor who had filed a claim with the bankruptcy court received full payment on their claims prior to plaintiff's suit." 676 F. Supp. at 502; App. 34a.

9 The claim in *Teledyne* was based on "specific fraudulent misrepresentations" made to plaintiff and, as such, it "belonged specifically and exclusively to the suing creditor, and neither to any other creditors nor to the insolvent corporate debtor." *MortgageAmerica*, 714 F.2d at 1277 n. 10.

the case at bar—a creditor of G&N alleged that defendant, G&N's primary lender, had depleted its funds by engaging in a kickback scheme at the same time that defendant was assuring the creditor that G&N had the necessary financing for a certain project. The Fifth Circuit concluded that the same principles of corporate law which bar stockholders from suing for wrongs to their corporation apply to "deny[ ] standing to the creditor of an alleged RICO victim." *Id.* at 254.[10] Only G&N's bankruptcy trustee, which had brought a RICO action against the same defendant (847 F.2d at 252 n. 1), could pursue such a claim.

Both under *Sedima* and "the general principles of causation," any injury to plaintiff as a G&N creditor did not "flow from" the alleged bribery. *Id.* at 254. *National Enterprises* concludes that the reference in *Sedima* to "recoverable damages" which "*flow* from" the predicate acts—the same language as quoted by the Court below (859 F.2d at 1100)—restricts standing to one injured more directly than a corporate creditor ordinarily would be. 847 F.2d at 254 (emphasis in original).[11]

The Court below described the injury to Bankers as arising from "the identical transactions that injured the bankrupt corporation." 859 F.2d at 1106; App. 21a. *See also id.* at 1101; App. 10a: "BAC might also have suffered an identical injury for which it has a similar right of recovery." Under the analysis of *National Enterprises*, Bankers has no standing under RICO to pursue its loss of a legitimate debt claim. Any right to recover belongs exclusively to BAC which, as the primary victim of the alleged wrongdoing and a party to a pending bankruptcy proceeding, is charged with acting for all creditor interests, including those of Bankers.

Moreover, the Seventh Circuit also would deny creditor standing in a RICO case such as this. *See, e.g., Barnett v. Stern*, 1988 WL 126593 (N.D. Ill. Nov. 30, 1988), concluding that, under *Koch* and *Carter*, *supra*, creditors do not have standing to bring RICO claims against the principals of a bankrupt

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10 As noted earlier, *supra* n. 4, the Court below specifically held to the contrary.

11 *Cf. Warren v. Manufacturers National Bank*, 759 F.2d 542 (6th Cir. 1985) (individual holding status as creditor, shareholder and employee of company has no standing to pursue RICO action for injury to company).

company—only the company's bankruptcy trustee may bring those claims on behalf of all creditors.[12] *Barnett* (at 8) specifically disagreed with the holding of the Second Circuit in this case that

> both the creditor and the trustee have standing to bring claims predicated on the depletion of the debtor's assets . . . . [W]hatever the law in the Second Circuit, the fact that this case arises under RICO rather than under common law provides no basis for reaching a different result here than did the Seventh Circuit in *Koch*.

Mitsubishi Electric Sales America Inc. v. Higgins, 1988 WL 124756 (N.D. Ill. Nov. 10, 1988) is to the same effect. There, citing *Koch* and *MortgageAmerica*, the Court dismissed a RICO claim by a creditor for lack of standing. The creditor alleged a conspiracy by defendants to defraud all of the creditors of a company subject to a pending bankruptcy proceeding. Because the injury to the creditor from the alleged wrongful conveyances was indirect, only the company's trustee could pursue the underlying claims for the benefit of all creditors.

The Second Circuit's refusal to impose any standing limitations here is in direct conflict with these decisions.

D. Well-Established Principles of Statutory Interpretation Support Rejection of Standing Here

The fact that Congress failed to supply explicit standing limitations for civil RICO does not support the conclusion that Congress intended that there be no standards at all, as the

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12 As *Barnett* points out, *Koch* (831 F.2d at 1343) cited *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576 (N.D. Ill. 1986) with approval. There, a creditor of American Wheel brought a RICO action alleging that defendants had improperly transferred its assets after it had filed for protection under the bankruptcy laws. The Court concluded that because plaintiff's injuries were "indistinguishable from those suffered by American Wheel itself," and also were "no different from that suffered by the other Chapter 11 creditors," plaintiff had no standing. *Id.* at 579. *See also* 676 F. Supp. at 500-03; App. 31a-35a (discussing *Dana*). Subsequently, the corporation's bankruptcy trustee brought a similar RICO action against the same defendants. *Levit v. Brodner*, 75 B.R. 281 (N.D. Ill. 1987).

Court below apparently believed. Rather, in such circumstances, courts should limit the scope of a statute to the objectives Congress clearly identified and expressly sought to achieve.

When a broad reading of a statute leads to unanticipated results, legislative intent is determined "not by the letter of the law" but by its "spirit." Such a determination takes into account not only the presence or absence of relevant legislative history but also the historical matrix from which the statute arises and the evil it is designed to remedy. *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). A particular sensitivity to context, both historical and statutory, is shown when the broad application of a general statute would disrupt an established federal regulatory scheme.

A statute should not generally be read in a manner inconsistent with other—and more specifically drawn—statutes. Here, absent expressions of Congressional intent to the contrary, RICO should not be read in a manner which disturbs the particular framework within which the bankruptcy laws traditionally operate. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) where, in holding broad venue provisions inapplicable in actions against national banks, the Court wrote: "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."[13]

For similar reasons, in *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976), the Court held that an amendment to the Suits in Admiralty Act did not authorize the bringing of claims otherwise barred by the Public Vessels Act. In the absence of "some expression by Congress that such results are intended," it declined to find a legislative decision to "compromise or abandon[ ] . . . previously articulated policies."

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13 In such circumstances, the silence of the legislative history "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds v. Companie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979).

And, in *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 23-24 (1976), the Court held that nuclear materials were not subject to regulation by the Federal Water Pollution Control Act ("FWPCA") even though, on its face, FWPCA appeared to encompass such materials. Pointing to the pervasive regulation of nuclear materials by the Atomic Energy Act, it found the legislative history of FWPCA did not contain "the clear indication of legislative intent that we might expect before recognizing such a change in policy."

This narrowing of a statute's scope operates forcefully when private rights are fully protected by existing federal legislation. Thus, in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979), the federal securities laws were held inapplicable to pension plans which were regulated by the more precisely drawn ERISA statute. It was noted that, unlike "the Securities Acts, ERISA deals expressly and in detail with pension plans" and that, in light of the "existence of this comprehensive legislation" it would "serve[ ] no general purpose" to apply the securities laws to pension plans. 439 U.S. at 569-70. *See also Marine Bank v. Weaver*, 455 U.S. 551, 556-59 (1982), determining that certificates of deposit did not qualify as "securities" within the meaning of the Securities Exchange Act of 1934 because the purchasers of those certificates were "abundantly protected" by the federal banking laws.

The approach of the Court below ignored the fact that, without a judicial delineation of standing limitations, the categories of claimants who may pursue RICO claims are limitless. Its approach may not, in the circumstances, be viewed as an appropriate exercise of deference to legislative judgment. The Second Circuit failed to recognize the significance of the fact that Congress did not anticipate the application of private civil RICO in the manner in which it is being used. The application of traditional standing limitations to RICO claims would therefore be in accord not only with Congress' intent but also with accepted canons of statutory interpretation.[14]

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14 *See, e.g., International Data Bank Ltd. v. Zepkin, supra*, 812 F.2d at 152-53, noting that Congress did not write the RICO statute in a vacuum

E. Deferring the Accrual of A Creditor's RICO Claim Does Not Ameliorate The Detrimental Impact On The Bankruptcy Process

The Court below purported to recognize the need to protect the bankruptcy process against claims which might interfere with marshalling a debtor's assets, pointing to the fact that, during the pendency of a bankruptcy proceeding, creditors are precluded from pursuing their own claims. 859 F.2d at 1100, 1101; App. 8a, 10a-11a. This preclusion exists to protect the integrity of a debtor's estate, which otherwise would be subject to numerous separate proceedings in which creditors struggled for priority through the pursuit of individual claims. *Id.*; *see also* 676 F. Supp. at 501; App. 32a-33a.

In an ultimately futile attempt to avoid disruption of this well-established principle of bankruptcy policy, the Court below concluded that accrual of a creditor's individual RICO claim could be deferred until "after the claims that [the creditor] has in common with [the debtor] are dealt with by the bankruptcy court—through recovery of all or part of [the debtor's] assets, an order of abandonment, or some other final disposition of the lost-debt claims." 859 F.2d at 1106; App. 22a. In its view, so long as a creditor could not commence its own RICO action until the bankruptcy proceeding has terminated, any threat of interference with the bankruptcy process would be avoided.

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and viewing as significant the virtual unanimity with which lower courts had limited standing under Section 10(b) of the Securities Exchange Act of 1934 to purchasers or sellers:

> If Congress had intended the drastic result of overturning this consensus, it surely would have done so in a more explicit way. . . . Where a predicate offense already had a well-developed private right of action under federal law, we think the better view is that Congress meant for RICO to expand the range of remedies by allowing for treble damages and attorneys' fees, rather than to summarily overturn the settled law.

As shown in the *Gochenour* cases, *supra*, the principle under which a creditor cannot pursue its own right to relief during the pendency of a bankruptcy proceeding is, at a minimum, nearly 50 years old.

As shown below, this facile device is not supported by any precedent. Moreover, at least insofar as the possibility of settlement is concerned, conferring standing in a deferred manner is no less destructive than permitting creditors to pursue actions while a bankruptcy proceeding is pending. The likelihood of future RICO claims by creditors will necessarily diminish, if not practically eliminate, all prospects of meaningful settlements with third parties allegedly liable to debtors' estates.[15]

The bankruptcy laws traditionally have sought to prevent an objecting creditor from gaining an unfair preferential advantage over other creditors. *See, e.g., Young v. Higbee Co.*, 324 U.S. 204, 210 (1945) ("[O]ne of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another"). Following the decision below, debtors-in-possession, trustees or others seeking to settle with parties charged with depleting a debtor's assets will find their ability to enter an agreement impaired. No longer will the rights of minority creditors opposing settlements be limited to their shares of any settlement proceeds. Instead, under the decision below, those creditors will gain leverage to seek a disproportionate share of any settlement proceeds by threatening individual RICO actions against the alleged wrongdoers. Because no one would be willing to settle with a debtor's estate without releases from the threatening creditors, those who support a settlement will be forced to pay an unfair tribute to accomplish one.

Thus, the Second Circuit's refusal to apply standing limitations here not only will open the courts to claims previously barred by well-established principles of law, but will, in addition, cause major disruptions to the bankruptcy settlement process.

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15 Shortly after the decision below was filed, it was applied to require the dismissal without prejudice of a RICO claim asserted by a creditor while a bankruptcy proceeding was pending. *L'Europeene de Banque v. La Republica de Venezuela*, [Current] RICO Business Disputes Guide (CCH) ¶ 7055 (S.D.N.Y. 1988). As time passes, other creditors are likely to threaten the assertion of "loss of legitimate debt" claims under RICO.

II. BOTH THE CONFLICT BETWEEN THE SECOND CIRCUIT AND THE THIRD CIRCUIT AS TO THE ACCRUAL OF A RICO CLAIM AND THE AVAILABILITY OF THE SPECULATIVE DAMAGES EXCEPTION TO DEFER THAT ACCRUAL PRESENT IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

As stated in *Wilson v. Garcia*, 471 U.S. 261, 266, 271 (1985):

> "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).
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> A federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." *Adams v. Woods*, 2 Cranch 336, 342 (1805). Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, the wrongdoers are permitted to assume that their sins may be forgiven.

Wilson shows that courts should hesitate before fashioning principles of limitations which serve to lengthen, especially without a fixed end point, the period during which parties may commence actions to redress violations known to them for many years. Generally, applicable periods of limitations are not extended unless plaintiff lacks knowledge of the wrongdoing or its injury therefrom, is under an infirmity, or seeks relief from a party not subject to process. Prior to the decision below, no court had held that an action pending for many years, seeking damages for alleged injuries which, to plaintiff's knowledge, it had incurred many years before the action was filed, was premature so as to support a dismissal without prejudice to the filing of a new action at an indeterminate point in the future.

Although the Second Circuit correctly determined the accrual principle to govern civil RICO claims, so much of its decision as held Bankers' loss of a legitimate debt claim premature violated the policy expressed in *Wilson* and, at the same time, misunderstood the manner in which conflicts between RICO and the federal bankruptcy laws should be resolved. In ignoring the admonition in *Sedima*, 473 U.S. at 490 n. 9, against the development of principles leading to the "pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications," the Second Circuit has created an unworkable doctrine which should be rejected by this Court.

A. Under The Rule Of Separate Accrual, RICO Claims For Injuries Known For More Than Four Years Are Barred

In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, ____ U.S. ____, 107 S. Ct. 2759 (1987), the Court, following the model of the Clayton Act, adopted a four-year statute of limitations for RICO claims. Because the earliest date the claim could have accrued was well within that period, it expressly left open the question of when a civil RICO claim accrues. *See* 859 F.2d at 1102; App. 12a, citing 107 S. Ct. at 2767. Since *Malley-Duff*, lower courts have determined the commencement of the period of limitations in various ways.

The Court below (859 F.2d at 1105; App. 19a-20a) selected what it termed a "rule of separate accrual." Under that rule,

> each time plaintiff discovers or should have discovered an injury caused by defendant's violation of § 1962, a new cause of action arises as to that injury, regardless of when the actual violation occurred. A plaintiff, under *Malley-Duff*, must then bring his action within four years of this accrual to recover damages for the specific injury. Naturally, as with all rules of accrual, the standard tolling exceptions apply.

Claims for injuries known to plaintiffs more than four years before the action is commenced are time-barred.

In adopting the rule of separate accrual, the Second Circuit rejected other theories of accrual approved by lower courts, such as the general federal rule,[16] the continuing violation doctrine—applied by the District Court in this case (859 F.2d at 1102; App. 13a, citing 648 F. Supp. at 86)—and rules measuring the limitations period from the date of the last predicate act, the first overt act causing damage, or the date of each injury. 859 F.2d at 1102; App. 12a-13a, and cases cited therein. Instead, aligning itself with *State Farm Mutual Automobile Ins. Co.* v. *Ammann*, 828 F.2d 4, 5 (9th Cir. 1987), it held that each time a plaintiff discovers or should have discovered its RICO injury, a new cause of action accrues to recover those damages. 859 F.2d at 1103; App. 15a-16a.

In a concurring opinion in *State Farm*, Judge Kennedy stated that "as to each injury the civil RICO statute of limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action." He noted that the Ninth Circuit had not decided "the extent to which separate injuries sustained within the limitations period might be actionable despite the existence of some time-barred causes of action." In such circumstances, according to Judge Kennedy (828 F.2d at 5), the following rules should apply:

> a cause of action accrues when new overt acts occur within the limitations period. . . . A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period. (citations omitted).

State Farm followed the Ninth Circuit's earlier decision in *Compton* v. *Ide*, 732 F.2d 1429 (9th Cir. 1984). *Compton* and other Ninth Circuit cases, such as *Beneficial Standard Life Ins. Co.* v. *Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) and *Volk*

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16 The general federal rule

> requires in cases involving continuing violation and continuous injury that the statute of limitations begin running upon the commission of the first overt act causing damage, and does not permit a subsequent injury to start the limitations period running anew. *Id.* at 1104-05; App. 18a.

v. D.A. Davidson & Co., 816 F.2d 1406, 1415 (9th Cir. 1987), hold that the RICO period of limitations does not begin to run until plaintiff discovered or should have discovered its injury. But, prior to the decision below, the only Court of Appeals decision addressing the treatment of RICO claims based upon separate injuries—some known to plaintiff more than four years before its action was filed and some not—was the concurrence in *State Farm*.[17] Subsequent to the decision below, however, the Third Circuit has addressed that issue and reached a different conclusion.

B. Under The Third Circuit's Rule, RICO Claims For Injuries Known For More Than Four Years Are Timely So Long As Any Predicate Act Occurs Within The Limitations Period

In *Keystone Insurance Co. v. Houghton*, 1988 WL 132681 (3d Cir. Dec. 15, 1988), the Third Circuit specifically rejected the rule of separate accrual adopted by the Second Circuit. It concluded (at 5) that RICO

> should not be interpreted to preclude actions based on injuries occurring outside the limitations period if injuries that are derived from the same pattern of racketeering are within the limitations period [or if] predicate acts . . . committed within the limitations period . . . are part of the same pattern [as the predicate acts causing those injuries].

The Third Circuit concluded (at 5-6) that the period of limitations begins to run from the date when plaintiff knew or should

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17 The other Courts of Appeals which addressed the accrual question have not addressed the separate injury question. *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1015 (11th Cir. 1986); *Bowling v. Founders Title Co.*, 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987). *See also LaPorte Construction Co. v. Bayshore National Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986). *Cf. Alexander v. Perkins Elmer Corp.*, 729 F.2d 576 (8th Cir. 1984) (applying Missouri law).

have known that both its injury and "the elements of the civil RICO cause of action existed." Moreover, if further injuries or further predicate acts occur, the period will not begin to run until

> plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. If the complaint was filed within four years of the last pattern or last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which are part of the same "pattern."

As recognized by the Third Circuit (at 8, 11-12 n. 5), *Keystone*'s accrual standard is practically indistinguishable from the one applied by the District Court in its 1986 decision in this case (648 F. Supp. at 35-38; App. 69a-74a), which the Second Circuit, in reversing, refused to adopt. Thus, *Keystone* not only specifically conflicts with the decision below but the decision below, in refusing to adopt the District Court's standard, conflicts, at least by implication, with the rationale subsequently followed in *Keystone*.

Significantly, while the Second Circuit's rule of separate accrual appears far more consistent with the principles of *Wilson v. Garcia* than *Keystone*,[18] that consistency disappeared as soon as the Second Circuit concluded that a speculative damages exception, purportedly drawn from *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), is applicable to defer the accrual of RICO claims.

The standard appropriate for determining the accrual of RICO claims presents an issue of growing importance which this Court ought to resolve now, especially in light of the con-

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18 Although *Keystone* (at 12 n. 6) purported to be "mindful" of the observation in *Wilson* against facilitating the litigation of stale claims, its view of the "organic" relationship of RICO, as reflected by what "the statute clearly intends," led it to adopt a last predicate act standard of accrual which has the effect of preserving stale claims.

flict between the Second and Third Circuits. At the same time, the availability of a speculative damages exception to the accrual of RICO claims also should be addressed. As applied by the Second Circuit, this exception improperly permits the pursuit of RICO claims for injuries known to plaintiffs prior to both the four-year period specified in *Malley-Duff* and the ten-year period recognized in *Keystone*.[19]

C. Time-Barred RICO Claims May Not Be Preserved Under The Speculative Damages Exception Simply Because Plaintiff's Damages May Be Reduced By A Recovery In Another Action

The Second Circuit's rule of separate accrual bars RICO claims for injuries known to plaintiffs more than four years before an action is commenced. As applied here, that rule bars claims for past "legal fees and other expenses which Bankers discovered or should have discovered before" August 1978, more than four years before it filed its RICO action; thus, the Second Circuit properly instructed the District Court to dismiss those claims. 859 F.2d at 1105; App. 20a. However, when considering Bankers' loss of a legitimate debt claim, based upon an an injury which Bankers admittedly discovered nearly two years before the August 1978 cutoff, it ordered a dismissal "without prejudice to refiling after the Bankruptcy Court has finally disposed of the corporation's claim based on the same underlying transactions." *Id.* at 1107; App. 23a.

The Second Circuit reached this conclusion because of the possibility that BAC might recover for the same wrongdoing: "Bankers would benefit along with BAC's other creditors and its injury would decrease" following such a recovery. As a result, it characterized Bankers' damages on its loss of a legitimate debt claim as " 'unrecoverable' . . . because 'their accrual is speculative' and 'their amount and nature unprovable' " and, despite the fact that it "[n]ormally" would have ordered that claim dismissed, the Second Circuit concluded that

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19 "[T]here is inherent in [18 U.S.C. § 1961(5)] a ten year limit on the point at which the last predicate act for purposes of accrual may occur." *Keystone*, at 8.

it would not accrue until the BAC bankruptcy proceeding was completed. 859 F.2d at 1105-06; App. 20a-22a. It wrote (*id.* at 1106; App. 22a):

> Consequently, after the claims that Bankers has in common with BAC are dealt with by the bankruptcy court—through recovery of all or part of BAC's assets, an order of abandonment, or some other final disposition of the lost-debt claims—Bankers' injury will be ascertainable, an action as to the injury will accrue, and Bankers will then have four years to bring a civil RICO action to recover the damages it has suffered in this area, subject of course to the normal rules and procedures governing such claims.

As shown below, Second Circuit misread the speculative damages exception set forth in *Zenith* and, in applying its version of that exception to RICO, improperly extended it beyond any reasonable bounds.

As set forth in *Zenith*, 401 U.S. at 339, the speculative damages exception provides as follows:

> In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.

The speculative damages exception was crafted to remedy a perceived problem with the ability of antitrust plaintiffs to recover damages for projected lost profits arising from improper market exclusion. Zenith sought damages under the antitrust laws for Hazeltine's unlawful participation in patent pools which had the effect of excluding Zenith from certain markets. Some of the injuries inflicted during the limitations period arose from conspiratorial conduct outside that period. Concluding that claims for projected lost profits extending more than five years into the future would have received "short

shrift'' had Zenith brought suit at the time its initial injuries were inflicted—even though, when Zenith's later-filed action was tried, those same claims were subsequently proven—the Court refused to view those claims as time-barred. 401 U.S. at 341-42. Because Zenith's anticipated damages for lost profits would have been so speculative at the time its initial injuries were inflicted, no claim to recover those damages would have accrued at that time.

Many courts have hesitated to apply the speculative damages exception to the accrual of antitrust claims even where projected lost profits are sought. In *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985), a company charged a textile manufacturer with procuring a patent by fraud and thereafter monopolizing production of the patented product. The Seventh Circuit, concluding that plaintiff should have sued when defendant procured the patent, held the action time-barred. It rejected the argument that the speculative damages exception applied because the plaintiff's damages were uncertain at that time:

> *Zenith* has not been understood to toll the antitrust statute of limitations in every case where the plaintiff is seeking damages for being excluded from a market the profitability of which will be revealed only in the fullness of time. . . . Exclusion from a market is a conventional form of antitrust injury that gives rise to a claim for damages as soon as the exclusion occurs . . . even though, in the nature of things, the victim's losses lie mostly in the future. *Id.* at 271.

Plaintiff could have proven its damages with sufficient certainty had it brought its action within a limitations period unextended by the speculative damages exception. It could have received a judgment directing defendant to disgorge its profits to that point in time and to transfer its patent to plaintiff to avoid additional damages in the future.

In *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 82-83 (6th Cir. 1981), plaintiff, an oil wholesaler, claimed that its supplier had compelled it to terminate its relationship with a competitor of the supplier as a condition to increasing its maximum

oil allocation. The Sixth Circuit held that the speculative damages exception was inapplicable because plaintiff's claim had accrued when the condition was imposed. Rejecting plaintiff's argument that its claim had not accrued, the Court noted that even the uncertainty of market conditions caused by the Arab oil embargo affected only the calculation of damages and would not have prevented a recovery. According to the Sixth Circuit, even though

> uncertain market conditions . . . certainly would have affected those calculations, had Barnosky brought suit during that period of time . . . . it is well settled that mere uncertainty as to the extent or amount of damages will not bar recovery under the antitrust laws. *Id.* at 83, citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

Courts refusing to apply the speculative damages exception recognize that *Zenith* did not promulgate a new standard for determining whether damages are speculative. For example, in *Aurora Enterprises, Inc. v. National Broadcasting Company, Inc.*, 688 F.2d 689 (9th Cir. 1982), a television production company sought relief for an illegal tying arrangement violating the antitrust laws. It claimed that defendant imposed as a condition to its purchase of plaintiff's network exhibition rights a right to purchase plaintiff's syndication rights as well. In holding the action time-barred because defendant had purchased the rights more than four years before the action was filed, the Ninth Circuit rejected plaintiff's argument that the speculative damages exception applied, concluding that the harm complained of was certain as soon as the contract was signed. "Mere uncertainty as to the extent or amount of damages will not bar recovery under the antitrust laws." 688 F.2d at 694, citing *Story*, *supra*, 282 U.S. at 562.

See also In re Multidistrict Vehicle Air Pollution, 591 F.2d 68, 73 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979) (distinguishing between uncertainty as to the existence of damage, which prevents recovery, and uncertainty as to the extent of damage, which does not—"that is, the failure to establish any injury,

from the not uncommon imprecision with regard to its scope"); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 573 (4th Cir. 1976) (under *Story*, when wrong has been proven, juries may render verdicts based on reasonable estimates of damage).

The decision below improperly extends the speculative damages exception beyond the areas of antitrust and projected lost profits. As stated in *Fitzgerald v. Seamans*, 553 F.2d 220, 227 (D.C. Cir. 1977):

> The *Zenith* doctrine arose in and has been confined to the area of antitrust treble damage recovery for lost profits. The *Zenith* exception to the statute of limitation is necessitated by the intersection of the traditional requirement of reasonable certainty of proof of lost profits and the strong congressional policy in favor of antitrust enforcement by private damage suits.

One court has explicitly held the *Zenith* exception inapplicable to a civil RICO action. In *5 Penn & Co. II v. Shearson Lehman Brothers, Inc.*, 1987 WL 19591 (E.D. Pa. 1987), a limited partner in an oil investment brought a RICO action alleging, as the underlying predicate acts, misrepresentations in violation of the federal securities laws in the marketing of the offering. To avoid the limitations bar, plaintiff argued that its claim did not accrue until the limited partnership became subject to bankruptcy proceedings.

The Court held (at 4) that plaintiff could have shown the worthlessness of its investment when it showed that it had relied on a material misrepresentation. Further, "even if the ultimate value of the investment was to some degree speculative until the . . . bankruptcy, plaintiff's damages based on a securities fraud claim were not speculative."[20]

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20 Several courts have refused to hold that the pendency of other proceedings renders damages so uncertain that deferral of the accrual of a separate claim is warranted. *See, e.g., Brunswick, supra*, 752 F.2d at 268, rejecting as "bizarre" the claim that any judicial action would have been "premature" prior to the termination of proceedings in the Patent Office and questioning

(footnote continued on next page)

Even if this Court should determine that, under appropriate circumstances, the speculative damages exception may be extended to RICO, the Second Circuit's application of it here was improper. Bankers' damages were not "speculative" in the sense that those in *Zenith* were, nor were they speculative in any other sense. The only uncertainty about the damages from Bankers' loss of a legitimate debt claim is the ultimate amount payable to Bankers, assuming it were to receive a favorable judgment in this action—that is, whether those damages might be reduced by any distribution to Bankers of its share of a recovery by the BAC estate.

The speculative damages exception may be invoked to avoid dismissal on limitations grounds of antitrust claims for projected lost profits arising from wrongdoing initially inflicted outside the limitations period. When a court believes that those claims would have failed if filed relatively contemporaneously with the wrongdoing, it may entertain an action filed at a later date. In other words, if plaintiff could not have demonstrated its entitlement to projected lost profits until a point which is timely if measured by a period of limitations computed back from the date on which its action is filed, the claims are not time-barred. Imposition of a limitations bar in these circumstances would be inequitable—speculative and unproveable claims do not become stale and time-barred unless plaintiff

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(footnote continued from previous page)

> the wisdom of allowing a plaintiff to wait for the unexpired portion of the statute of limitations to expire after the agency proceedings are complete before he sues, rather than suing if need be while those proceedings are going on and staying the suit till they have been completed.

See also Fitzgerald, supra, 553 F.2d at 226-27 (claim in action for wrongful discharge was independent of Civil Service Commission remedy and accrued upon discharge "even though the extent and precise nature of the injury had not yet developed"); *Mir v. Little Company of Mary Hospital*, 844 F.2d 646 (9th Cir. 1988) (physician's antitrust action against hospital for loss of future earnings resulting from denial of privileges accrued prior to disposition of state court action for injunctive relief); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441 (7th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) (disposition of divestiture proceeding did not affect right to future damages).

receives a meaningful opportunity to pursue them after they first become proveable and timely.

The situation here bears no resemblance to that addressed by the speculative damages exception. In its loss of a legitimate debt claim, Bankers does not seek lost profits, proof of which would have been speculative as of August 1978, four years before this action was filed. Instead, the damages relevant to its claim always have been subject to simple quantification—the amount of the debt claimed to have been wrongfully discharged by the bankruptcy court's 1976 approval of the BAC plan of reorganization.

The possibility that Bankers might receive a recovery in one proceeding reducing or eliminating its right to a recovery in another provides no support for any exception to the principles of accrual governing the periods of limitation applicable to either claim. The simple fact is that when Bankers moved to revoke the BAC plan in 1976, RICO had been violated, Bankers had been injured and Bankers knew of its injury. Thus, any right Bankers had to file its own RICO action in the District Court expired in 1980, nearly two years before it filed the present action. Any right to recover from the alleged wrongdoer can only be realized from a distribution of the proceeds of a judgment or settlement of a claim by BAC on behalf of all of its creditors.

Courts should hesitate to apply the speculative damages exception to support the dismissal of an action without prejudice to the filing of a new action at an indeterminate date in the future. In *Zenith* and the cases which follow it, the exception is applied to determine whether a pending action is time-barred because an earlier hypothetical action might have been timely. In the Second Circuit's view, Bankers' loss of a legitimate debt claim is the counterpart to the hypothetical earlier action in *Zenith*—just as that hypothetical action did not have to be brought to avoid a limitations bar because Zenith's claim had not accrued, the Second Circuit believed that Bankers did not have to bring this action because its claim had not accrued.

This logic turns *Zenith* on its head—instead of an equitable rationale enabling courts to address the merits of a pending claim where an earlier failure to file may be excusable, the deci-

sion below permits a court to sidestep the merits of claims litigated for many years by deferring their determination to an unknown point in the future. The Second Circuit has created a device which, without logic, law or equity to support it, effects a legal transmigration, creating an unborn potential claim out of a time-barred claim.

CONCLUSION

For the foregoing reasons, Soifer respectively requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
February 8, 1989

JOEL W. STERNMAN
(Counsel of Record)
AUDRY WEINTROB

ROSENMAN & COLIN
575 Madison Avenue
New York, New York 10022
(212) 940-8800

Attorneys for Petitioner
Herman Soifer

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No. 88-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

DANIEL RHOADES and MILTON BRATEN,

Petitioners,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL W. STERNMAN
(Counsel of Record)

AUDRY WEINTROB
ROSENMAN & COLIN
575 Madison Avenue
New York, New York 10022
(212) 940-8800

Attorneys for Petitioner Herman Soifer

THOMAS LAGROTTA
(Counsel of Record)

42 Saratoga Avenue
Pleasantville, New York 10570
(212) 481-5300

Attorneys for Petitioners Daniel Rhoades and Milton Braten

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1074—August Term 1987

Argued: April 28, 1988 Decided: October 3, 1988

Docket No. 88-7054

BANKERS TRUST COMPANY,

Plaintiff-Appellant,

—against—

DANIEL RHOADES, HERMAN SOIFER and MILTON BRATEN,

Defendants-Appellees.

Before:

CARDAMONE, PRATT, and MAHONEY,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, William C. Conner, *Judge*, dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), plaintiff's civil RICO complaint alleging that defendants, through common-law fraud, bankruptcy

fraud, perjury, and bribery, attempted to prevent plaintiff from collecting a debt owed to it by defendants' bankrupt corporation.

Reversed and remanded.

DAVID RABINOWITZ, New York, NY (David B. Picker, Moses & Singer, New York, NY, of Counsel), *for Plaintiff-Appellant*.

JOEL W. STERNMAN, New York, NY (Steven Alexander, Rosenman & Colin, New York, NY, of Counsel), *for Defendant-Appellee Herman Soifer*.

THOMAS LAGROTTA, Brewster, NY (Daniel Rhoades, Rhoades & Rhoades, Brewster, NY, of Counsel), *for Defendants-Appellees Daniel Rhoades and Milton Braten*.

PRATT, *Circuit Judge*:

This case is now on its second trip through the federal appellate system. On the first appeal, Bankers Trust Company ("Bankers") avoided dismissal when our split decision, holding that Bankers had failed to state a claim under 18 U.S.C. §§ 1964(c) and 1962 because it had not suffered "a distinct RICO injury" from defendants' alleged RICO violation, was vacated by the Supreme Court. *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *vacated*, 473 U.S. 922 (1985).

This time the issues are different, but they still focus upon whether Bankers can press its civil RICO action against these defendants. First, does Bankers lack standing to bring a civil RICO action against the officers of a bankrupt corporation for injuries sustained as a result of the officers' fraudulent depletion of corporate assets? Second, is Bankers' action barred by the statute of limitations?

The district court decided both questions against Bankers and dismissed the action pursuant to Fed. R. Civ. P. 12(b)(6). We disagree with the district court and hold that (1) Bankers has standing to bring a civil RICO action against these defendants, and (2) that Bankers' action, at least in part, is not barred by the statute of limitations, but (3) that the portion of Bankers' claim seeking to recover for its lost debt is premature and therefore must be dismissed without prejudice. Accordingly, we reverse and remand.

I. BACKGROUND

In reviewing this motion to dismiss under Fed. R. Civ. P. 12(b)(6), we must accept the allegations of plaintiff's complaint as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Cooper v. Pate*, 378 U.S. 546, 546 (1964).

Daniel Rhoades, Herman Soifer, and Milton Braten own, direct, and control Braten Apparel Corporation ("BAC"), a New York corporation grossing over $50 million per year through the import, manufacture, and sale of apparel. As with most businesses of this size, BAC has multiple creditors, the largest being Bankers—a banking company incorporated and headquartered in New York City—to which BAC currently owes over $4 million.

In August 1974, due to severe financial losses and in an effort to avoid BAC's liabilities to Bankers and other creditors, Braten and Soifer agreed to seek a reduction of the corporation's debts through a Chapter 11 bankruptcy proceeding. In so doing, they agreed to fraudulently conceal from BAC's creditors a major asset: Brookfield Clothes, Inc. ("Brookfield"), a recently acquired corporation specializing in the sale of apparel, with net assets in excess of $3 million.

To carry out this scheme, Braten and Soifer executed a sham document which they later claimed was a valid shareholders' agreement. The document required BAC or Braten to lend Brookfield $250,000 by a specified date, in default of which BAC's ownership of Brookfield would be transferred to Soifer. Soifer and Braten never intended that the loan be made, but expected that the bankruptcy court and BAC's creditors, upon being shown the sham document and being informed that the condition had not been met, would believe that BAC no longer had any ownership interest in Brookfield. Braten and Soifer agreed that Soifer would hold Brookfield in a secret trust during the pendency of BAC's Chapter 11 proceedings, and would return it only after BAC had achieved a substantial reduction in its debts through a confirmed reorganization plan.

After completing this fraudulent transfer, BAC filed a petition in bankruptcy on September 5, 1974. Rhoades acted as attorney for BAC and, along with Braten and Soifer, misrepresented to the court, to Bankers, and to other creditors that, because BAC had failed to issue the loan as required under the shareholders' agreement, it no longer had any ownership interest in Brookfield.

Relying on these misrepresentations, Bankers agreed to, and the bankrupty court confirmed, a plan of arrangement for BAC under which Bankers agreed to receive only 17.5% of its allowed claim. This plan relieved BAC of more than $4.3 million in debts, and permitted it to continue operating with Rhoades, Braten, and Soifer retaining control. Critical to Bankers' acceptance of the plan was its belief that *all* BAC assets were being made available to the Chapter 11 proceeding. Had it known of the fraudulent transfer of Brookfield, Bankers never would have consented to the reorganization plan.

Shortly after confirmation of the plan and termination of the bankruptcy proceedings, Soifer, through a complicated series of transactions, returned ownership and control of Brookfield to BAC. At that time, Brookfield anticipated sales of $18 million in the coming year, had an annual net income in excess of $1.4 million, and had assets valued at well over $10 million.

In a further attempt to delay Bankers from collecting its debt, Rhoades, Braten and Soifer initiated frivolous lawsuits against Bankers in both New York and South Carolina state courts. In connection with the South Carolina action, in late 1978 Rhoades acquired, through a South Carolina corporation which he formed and which Soifer and Braten owned, a mortgage on which the judge presiding over the South Carolina action was personally obligated. Through an illegal agreement with the South Carolina judge, defendants then paid the judge's debt as the mortgage installments came due. In return, the judge rendered two decisions favorable to BAC: on November 9, 1978, he denied Bankers' motion to dismiss the action; and on January 18, 1979, he appointed a special referee who had ties to BAC and its counsel. These two bribed

decisions caused Bankers to expend over $100,000 in legal fees.

In September 1976, upon learning of the transfer of Brookfield back to BAC, Bankers moved in the bankruptcy court to revoke BAC's confirmation plan, alleging that it had been procured by fraud. The record is unclear as to why the bankruptcy court did not act on this motion immediately; but whatever the reason, in 1981-82, over five years after Bankers moved to revoke but while that motion was still pending, Rhoades, Braten and Soifer, in a continuing attempt to prevent Bankers and other creditors from collecting their debts, conspired to and did in fact fraudulently conceal and deplete BAC assets through a wide variety of methods, including fraudulent stock transfers, transfers of corporate assets to other companies and individuals without fair consideration, and transfers of monies in corporate accounts to satisfy defendants' personal debts. Finally, on June 30, 1982, the bankruptcy court, holding that BAC had obtained its Chapter 11 reorganization by fraudulent means, revoked its confirmation plan and reinstated the bankruptcy proceedings. Those proceedings are still pending in the bankruptcy court.

Bankers commenced this action against defendants in the district court on August 24, 1982. It alleged that the continuing actions of Rhoades, Braten and Soifer—the common-law fraud and bankruptcy fraud in 1974-76, the frivolous lawsuits and bribery of the South Carolina judge in 1978-79, and the fraudulent conveyances in 1981-82—constituted a "pattern of racketeering activity" in violation of 18 U.S.C. § 1962(a)-(d).

In his first decision in 1983, Judge Conner found that plaintiff's complaint alleged a violation of 18 U.S.C. § 1962, and that "the injuries suffered by Bankers were a

direct consequence of the predicate acts." *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1242 (S.D.N.Y. 1983). Nevertheless, he dismissed the complaint because Bankers did not suffer a "competitive" injury. *Id.* at 1240-42. A divided panel of this court affirmed, *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1983), but the Supreme Court subsequently vacated the judgment, *see Bankers Trust Co. v. Rhoades*, 473 U.S. 922 (1985), in light of its decision in *Sedima v. Imrex Co.*, 473 U.S. 479 (1985).

On remand, the district court received further briefing on two issues raised in defendants' initial motion to dismiss but not addressed in the court's first decision: standing and statute of limitations. Thereafter, on September 3, 1986, the district court issued an order (1) upholding the complaint as to Rhoades and Braten; (2) dismissing the claims of substantive RICO violations against Soifer as time-barred; but (3) upholding the claim that Soifer conspired with the other defendants to violate RICO. On the standing issue, the district court specifically held that Bankers had asserted "injuries * * * in its own right", not merely injuries to BAC which might be recoverable only by a bankruptcy trustee. *Bankers Trust Co. v. Feldesman*, 648 F. Supp. 17 (S.D.N.Y. 1986).

Defendants moved to reargue, and on December 22, 1987, the district court reversed itself in part and dismissed Bankers' complaint as to all defendants. Specifically, the district court held that Bankers lacked standing to pursue a civil RICO action based on defendants' common-law fraud, perjury and bankruptcy fraud—all alleged to be part of defendants' attempt to deplete BAC assets—because Bankers had suffered no injury from these illegal acts. Rather, the court stated, only BAC, as the corpora-

tion whose assets were fraudulently transferred, was injured by defendants' actions. In addition, applying a three-year statute of limitations, the district court held the bribery claims time-barred because the last injury to Bankers occurred on January 18, 1979, over three years before it commenced its RICO action in federal court. *Bankers Trust Co. v. Feldesman*, 676 F. Supp. 496 (S.D.N.Y. 1987).

This appeal followed.

II. DISCUSSION

Bankers' argument on appeal is two-fold. First, it argues that it has standing to pursue a civil RICO claim directly against the individual defendants, and that the district court's holding to the contrary was error. Second, Bankers contends that the district court erred in dismissing on statute of limitations grounds. We agree with both contentions.

A. *Bankers' Standing to Bring a RICO Claim.*

Determining that formulation of an acceptable plan of reorganization "would be all but impossible if a creditor could employ RICO to recover misappropriated assets from the bankrupt's corporate officers" during the pendency of the bankruptcy proceedings, the district court held that Bankers had no standing "to sue for any injury attributable to the depletion of BAC's corporate assets." Such analysis correctly perceives a legitimate problem—if Bankers is allowed to bring its RICO claim (and collect treble damages plus costs and attorney's fees), there may well be nothing left for the bankrupt's estate to recover—

but it uses the wrong mechanism to ensure that problem's solution.

The civil RICO statute, 18 U.S.C. § 1964(c) provides that "*[a]ny person* injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor * * * and shall recover threefold the damages he sustains * * *." (emphasis added). This language contains no special limitation on standing; all that is required is that plaintiff suffer injury in fact, *see Sedima v. Imrex Co.*, 473 U.S. 479, 495 (1985) (the only standing requirement under § 1964(c) is that the plaintiff be "injured in his business or property by the conduct constituting the violation"), and that the injury be caused by defendants' RICO violation. Thus, as another panel of this court recently recognized: "A defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, but only to anyone whose injuries were caused by reason of a violation of section 1962." *Sperber v. Boesky*, 849 F.2d 60, 64 (2d Cir. 1988) (citation omitted). Significantly, this injury is not limited to damages suffered from the RICO violation as a whole, but also includes injuries suffered from each predicate act. Those acts are, when committed in the circumstances delineated in § 1962, "an activity which RICO was designed to deter", and recoverable damages "will flow from the commission of the[se] predicate acts." *Sedima*, 473 U.S. at 496.

With these principles in mind, along with congress's instructions that we broadly construe the statute, *see* Pub. L. 91-452, Title IX, Section 904, 84 Stat. 941, we hold that the district court erred when it applied an additional, special requirement of standing to Bankers' civil RICO claim. Put simply, if Bankers was injured by defendants' acts, as

its complaint adequately alleges in this case, *see* 741 F.2d at 515-16, it has standing to bring a RICO claim, regardless of the fact that a bankrupt BAC might also have suffered an identical injury for which it has a similar right of recovery.

This conclusion is not contrary to our decision in *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986), where we held that the shareholder of an injured corporation did not have individual standing to bring a claim under civil RICO. In so holding, we merely recognized a standing requirement applicable throughout corporate law: "An 'action to redress injuries to a corporation cannot be maintained by a shareholder in his own name but must be brought in the name of the corporation' " through a derivative action. *Id.* at 849 (*quoting Warren v. Manufacturers National Bank*, 759 F.2d 542, 544 (6th Cir. 1985)).

In this case, Bankers does not seek recovery for injuries suffered by BAC, but for injuries it suffered directly. Defendants' conduct—bribery, perjury, fraud, and bankruptcy fraud—caused Bankers monetary damage, and the right to recover for that injury belongs, not to BAC or its bankrupt estate, but to Bankers. *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir.), *cert. denied*, 479 U.S. 950 (1986) (where plaintiff corporation alleged that it suffered damages from the fraud of a director of a bankrupt corporation, plaintiff has a right to recover separate from any claim the bankrupt corporation may have).

It is true, as defendants argue and the district court recognized, that there is an overlap of RICO and bankruptcy law in this case. *Bankers Trust Co. v. Feldesman*, 676 F. Supp. 496, 503 (S.D.N.Y. 1987) ("Equitable distribution, the fundamental principle of bankruptcy, would be all but

impossible if a creditor could employ RICO to recover misappropriated assets from the bankrupt's corporate officers during the pendency of a Chapter 11 reorganization."). Such an overlap occurs not only because Bankers was injured by the identical transactions that injured the bankrupt corporation, but also because to the extent that the corporation, through its trustee in bankruptcy, is able to recover for its injury, Bankers' injury will be correspondingly reduced.

This overlap, however, does not present a question of Bankers' standing to bring a civil RICO claim, but rather presents the question of which and how much in damages Bankers can recover under that RICO claim, an issue we discuss in depth later in this opinion. *See infra, Part B, subsection 2(b).* As far as standing is concerned, there is no doubt, taking Bankers' allegations as true, that defendants violated § 1962 and that Bankers suffered injury from that violation. This is all that is necessary in order to bring an action under § 1964(c). *Sedima*, 473 U.S. at 495.

B. *Statute of Limitations.*

To begin with, the district court erred in applying a three-year limitations period to this civil RICO action. Six months before the district court issued its decision, the Supreme Court, perceiving a need for uniformity and following the model of the Clayton Act, *see* 15 U.S.C. § 15b (Supp. 1988), decreed that a four-year period should apply to all civil RICO actions regardless of the predicate acts involved. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, ____ U.S. ____, 107 S. Ct. 2759, 2767 (1987).

Correcting this error does not end our inquiry as to whether the judgment of the district court must be reversed, however, because there is another, far more dif-

ficult part to the limitations problem: when did Bankers' civil RICO action accrue? Did it accrue when defendants depleted BAC assets in 1972-74? When Bankers learned of those depletions in 1976? Or in 1978-79 when defendants again attempted to prohibit Bankers from collecting its rightful debt? Or in 1981-82 when defendants took further steps to deplete corporate assets? Or perhaps the action is yet to accrue as Bankers suffers new injuries from defendants' past or future RICO violations growing out of the same pattern of racketeering?

1. *Accrual of a civil RICO action.*

Because the earliest date the cause of action could have accrued in *Malley-Duff* was well within the four-year period adopted by the Court, the Supreme Court expressly left undecided the question of when a civil RICO action accrues. *Malley-Duff*, ____ U.S. at ____, 107 S. Ct. at 2767. Over the past few years, our district courts have wrestled with this accrual issue, but have reached varied, sometimes conflicting, results. *See, e.g., Long Island Lighting Co. v. Imo Delaval, Inc.*, 668 F. Supp. 237, 239-40 (S.D.N.Y. 1987) (explicitly rejecting plaintiff's theory that a civil RICO action does not accrue until commission of the last predicate act upon which the claim is founded, court holds that a claim "accrues when the plaintiff knows or should know of the injury that is the basis for the action"); *Cantor v. Life Alert, Inc.*, 655 F. Supp. 673 (S.D.N.Y. 1987) ("statute of limitations begins to run after commission of the first overt act causing damage"); *State of New York v. O'Hara*, 652 F. Supp. 1049, 1056 (W.D.N.Y. 1987) (civil RICO action for each injury accrues on the date each injury occurred); *Cahill v. Arthur Andersen & Co.*, 659 F. Supp. 1115, 1126 (S.D.N.Y. 1986) (action accrues at time of last alleged predicate act), *aff'd*

on other grounds, 822 F.2d 14 (2d Cir. 1987) (per curiam); *Bankers Trust Co. v. Feldesman*, 648 F. Supp. 17, 36 (S.D.N.Y. 1986) (applying the "continuing violation doctrine" to civil RICO claims). Recognizing this confusion, we today decide the question and hold that each time a plaintiff suffers an injury caused by a violation of 18 U.S.C. § 1962, a cause of action to recover damages based on that injury accrues to plaintiff at the time he discovered or should have discovered the injury.

We find support for this holding in two major sources. First and most important, the plain language of the statute requires it. Under § 1962, a person commits a RICO violation when he (a) invests income derived from a "pattern of racketeering" in an "enterprise"; or (b) controls an "enterprise" through a "pattern of racketeering activity"; or (c) participates in an "enterprise" through a "pattern of racketeering activity"; or (d) conspires to violate subsection (a), (b) or (c). 18 U.S.C. § 1962(a)-(d) (1984). In other words, a violation of § 1962 occurs when a person, through a "pattern of racketeering activity", acts to invest in, participate in, or control an "enterprise". Criminal liability for any of these violations is subject to a five-year statute of limitations which runs—where a substantive violation is alleged pursuant to subsection (a), (b) or (c)—from the time of the last predicate act of racketeering activity by the defendant, or—where a conspiracy violation is alleged pursuant to subsection (d)—from the time the objectives of the conspiracy have been accomplished or abandoned. *United States v. Persico*, 832 F.2d 705, 713-14 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1996 (1988).

An action to recover civil damages for these same criminal violations, while closely related, is nevertheless subject to an additional requirement. Section 1964(c) provides

that only a "person injured in his business or property by reason of a violation of section 1962" may bring a civil RICO action. Thus, a civil plaintiff must prove not only that the acts of defendant constitute a RICO violation, but also that plaintiff suffered injury as a result of that violation. *See Sperber v. Boesky*, 849 F.2d 60, 64 (2d Cir. 1988) (defendant liable only for injury "caused by reason of a violation of section 1962"); *Haroco, Inc. v. American National Bank and Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam). Until such injury occurs, there is no right to sue for damages under § 1964(c), and until there is a right to sue under § 1964(c), a civil RICO action cannot be held to have accrued. *See Sedima v. Imrex Co.*, 473 U.S. at 496 (plaintiff "can only recover to the extent that * * * he has been *injured* in his business or property by the conduct constituting the violation") (emphasis added).

Even after injury has occured, however, and a civil RICO claim has accrued, there will frequently be additional, independent injuries that will result from the same violation of § 1962, but which, because they will not occur until some point in the future, are not yet actionable as injuries to plaintiff's business or property. 18 U.S.C. § 1964(c) (1984). Multiple injuries, spread over time, frequently result from the very nature of a RICO violation. As we have recognized before, congress enacted RICO to deal with a broadly based, deeply rooted problem by establishing new prohibitions, enhanced sanctions, and new remedies to deal with the activities of those engaged in illegal practices. *Durante Bros. & Sons, Inc. v. Flushing National Bank*, 755 F.2d 239, 248 (2d Cir.), *cert. denied*, 473 U.S. 906 (1985) (citing Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of Findings and Purpose)). Rather than simply providing a

new avenue of redress for wrongs cognizable at common law or prohibited by statute, congress's main goal was to eradicate organized crime. *Cullen v. Margiotta*, 811 F.2d 698, 718 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987). To reach this goal, RICO takes a unique approach: it looks for a "pattern" of illegal acts—each of which, standing alone, may injure a plaintiff—and then views them together as a single violation. As a result, there may be encompassed within a single RICO violation injuries, both multiple and independent, that occur over a broad span of time. *See generally Sedima*, 473 U.S. at 496 & n.14.

With these multiple injuries in mind, congress tied the right to sue for damages under § 1964(c), not to the time of the defendant's RICO violation, but to the time when plaintiff suffers injury to "his business or property" from the violation. Consequently, a plaintiff's action accrues against a defendant for a specific injury on the date that plaintiff discovers or should have discovered that injury. *See Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir.) ("[u]nder federal principles, a claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of the action") (citation omitted), *cert. denied*, 107 S. Ct. 3266 (1987). At a later date, when a new and independent injury is incurred from the same violation, the plaintiff is again "injured in his business or property" and his right to sue for damages from that injury accrues at the time he discovered or should have discovered that injury. The logical end result is that a plaintiff may sue for any injury he discovers or should have discovered within four years of the commencement of his suit, regardless when the RICO violation causing such injury occurred. *See State Farm Mutual Automobile Insurance Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) ("as to each injury civil RICO limitations period 'begins to run when the

plaintiff knows or has reason to know of the injury which is the basis of the action' ") (citation omitted).

We hasten to add that although a cause of action for a new and independent injury does not accrue until the plaintiff actually suffers that injury, this does not mean that a plaintiff can never recover future damages on a civil RICO claim. On the contrary, where the plaintiff has already suffered injury and will continue to suffer that *same* injury in the future, an award of past and future damages may be entirely appropriate, subject of course to the normal standards governing such awards. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Only in instances where the plaintiff has suffered no injury, or where the injury is unprovable, is an award of future damages inappropriate. *See* 18 U.S.C. § 1964(c) (1984); *Zenith*, 401 U.S. at 339.

As a second major source of support to the rule of separate accrual that we apply today, we look to the Clayton Act, 15 U.S.C. § 15 *et seq.* (Supp. 1988). In holding that the Clayton Act's four-year statute of limitations was "the most appropriate limitations period for [civil] RICO actions", the Supreme Court explicitly recognized that "the civil action provision of RICO was patterned after the Clayton Act." *Malley-Duff*, ____ U.S. at ____, 107 S. Ct. at 2764, 2767. Indeed, "[t]he 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.' " *Id.* at ____, 107 S. Ct. at 2764 (*quoting Sedima*, 473 U.S. at 489). Noting the statutes' similarities, the Court found that both RICO and the Clayton Act "are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees";

that both statutes "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"; that "the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages"; and that both statutes "aim to compensate the same type of injury" by requiring "that a plaintiff show injury 'in his business or property by reason of' a violation". *Id.* at ____, 107 S. Ct. at 2764.

In light of these similarities, we have little trouble in concluding that the same statute which lends its four-year limitation period to civil RICO actions should also lend its rule of accrual in determining when the four-year period begins to run. Generally, a cause of action under the Clayton Act accrues and the statute of limitations begins to run, when a defendant commits an antitrust violation that injures a plaintiff's business. *Zenith*, 401 U.S. at 338; *Berkey Photo*, 603 F.2d at 295. An action for the injury must be brought within four years, plus any additional period during which the statute of limitations may be tolled. *Zenith*, 401 U.S. at 338.

In the context of a continuing antitrust violation with continuing injuries, this has usually been understood to mean that each time plaintiff suffers an injury caused by an illegal act of defendants, a cause of action accrues to plaintiff to recover damages based on that injury. *Zenith*, 401 U.S. at 338; *Crummer Co. v. Du Pont*, 223 F.2d 238, 247-48 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955). "Each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial."

Zenith, 401 U.S. at 338-39. Thus, if a plaintiff discovers or should have discovered injury from an antitrust violation on a specific date, "a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future * * *." *Id.* To recover those damages, he must sue within four years of the time the action accrued.

Of course, future damages arising from defendants' conduct are "unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Id.*; *see also Berkey Photo*, 603 F.2d at 295; *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872, 884 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972). In such cases, "refusal to award future damages as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. The cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted." *Zenith*, 401 U.S. at 339. These Clayton Act principles of accrual apply equally to civil RICO actions.

We realize that in adopting a "rule of separate accrual" *State Farm*, 828 F.2d at 5 (Kennedy, C.J., concurring), we are rejecting the general federal rule of accrual, which requires in cases involving continuing violation and continuous injury that the statute of limitations begin running upon the commission of the first overt act causing damage, and does not permit a subsequent injury to start the limitations period running anew. *See Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F. Supp. 640, 644 (S.D.N.Y. 1964) (collecting cases). Such a rejection is mandated by the continuing violations and injuries sought to be reme-

died under RICO and the Clayton Act. "Otherwise, future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve 'as a bulwark of * * * enforcement,' and that the * * * laws fully 'protect the victims of the forbidden practices as well as the public.' " *Zenith*, 401 U.S. at 340 (citations omitted).

In sum, we today hold that civil RICO actions are subject to a rule of separate accrual. Under this rule, each time plaintiff discovers or should have discovered an injury caused by defendant's violation of § 1962, a new cause of action arises as to that injury, regardless of when the actual violation occurred. A plaintiff, under *Malley-Duff*, must then bring his action within four years of this accrual to recover damages for the specific injury. Naturally, as with all rules of accrual, the standard tolling exceptions apply. *See, e.g., Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (class action tolling); *State of New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1084 (2d Cir. 1988) (fraudulent concealment); *Cullen v. Margiotta*, 811 F.2d 698, 721-24 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987) (class action and duress).

2. *Application to this case of the statute of limitations under the rule of separate accrual.*

Having determined generally that plaintiff may recover for any injury caused by defendants' RICO violation if plaintiff discovered or should have discovered that injury within four years of the commencement of this action, we now apply this standard to Bankers' specific injury claims.

Bankers commenced its action on August 24, 1982; hence, it may recover for any injury it discovered or

should have discovered on or after August 24, 1978. In its third amended complaint, Bankers alleges multiple injuries which may be grouped into three general categories: (a) past legal fees and other expenses, (b) loss of a legitimate debt and related expenses, and (c) future legal fees and expenses. We shall discuss each in turn.

a. *Past legal fees and other expenses.* Several injuries claimed by Bankers fall within this category: (1) an unspecified amount in legal fees and other expenses incurred in fighting defendants' frivolous lawsuits in New York state court; (2) $100,000 in legal fees and other expenses spent in overcoming bribe-induced decisions in a similar lawsuit in South Carolina; and (3) $100,000 in legal fees and other expenses incurred in obtaining a revocation of the initial reorganization plan.

Under our rule of separate accrual, Bankers may recover any of these expenses which it discovered or should have discovered on or after August 24, 1978. We therefore instruct the district court that it may dismiss from this action any claim for legal fees and other expenses which Bankers discovered or should have discovered before that date. In so instructing, we note our agreement with Judge Conner when he held that Bankers suffered injury as to each expense when it became obligated to pay that expense, and not at some later date when it actually made the payment. *Bankers Trust Co. v. Feldesman*, 676 F. Supp. 496, 504 (S.D.N.Y. 1987) ("If Bankers was able to postpone accrual of its claim until it had paid its legal expenses, then Bankers could keep its claim open indefinitely simply by protracting the litigation.").

b. *Loss of a legitimate debt and related expenses.* In this second category, Bankers claims (1) loss of a legiti-

mate debt in 1976 when, relying on defendants' misrepresentations, it accepted a bankruptcy reorganization plan that would have allowed Bankers to recover only 17.5% of its allowed claim; (2) loss of the use of those funds from that time to present; and (3) an additional loss in funds which might have been used to pay the debt in 1981-82, but were instead fraudulently transferred by the defendants.

Normally of course, we would simply instruct the district court to determine what portion of these injuries Bankers discovered or should have discovered after August 24, 1978, and order that Bankers could not recover on any injury which it discovered or should have discovered before that date. However, in this case, we hold that Bankers' damages in this category are "unrecoverable", at least at this time, because "their accrual is speculative" and "their amount and nature unprovable". *Zenith*, 401 U.S. 339; *Berkey Photo*, 603 F.2d at 295.

As discussed previously, Bankers' RICO claim for injuries suffered as a result of its lost debt overlaps with the ongoing proceedings in the bankruptcy court. This is because (1) Bankers was injured by the identical transactions that injured the bankrupt corporation, and (2) should the corporation, through its trustee in bankruptcy, recover for its injury, Bankers' injury will itself be reduced. For instance, should the bankruptcy trustee ultimately recover all the fraudulently transferred assets, Bankers' injury could be significantly reduced; conversely should the assets never be recovered, or should the bankruptcy court order the claim abandoned, Bankers' injury would be much more severe.

Trebling and attorney's fees aside, congress intended the basic award under civil RICO to compensate the plaintiff for injury to "his property or business." 18 U.S.C.

§ 1964(c) (1984). As in other areas of the law, this compensation takes the form of awarding damages sufficient to place the plaintiff in the same financial position he would have occupied absent the illegal conduct. *Illinois C.R. Co. v. Crail*, 281 U.S. 57 (1930); *United States Steel Products Co. v. Adams*, 275 U.S. 388 (1928).

Yet, at this time, it is impossible to determine the amount of damages that would be necessary to make plaintiff whole, because it is not known whether some or all of the fraudulently transferred funds will be recovered by the corporation. Should they be recovered, Bankers would benefit along with BAC's other creditors and its injury would decrease. As a result, the damages in this area are "speculative" and "unprovable", *Zenith*, 401 U.S. at 399; any claim for relief based on the lost-debt injury must therefore be dismissed without prejudice.

As we stated previously, refusal to award damages as too speculative is equivalent to holding that no cause of action has yet accrued. *Zenith*, 401 U.S. at 339. When the damages do become definite, a claim will accrue, and plaintiff will have four years to bring an action for recovery. *Id.* Consequently, after the claims that Bankers has in common with BAC are dealt with by the bankruptcy court—through recovery of all or part of BAC's assets, an order of abandonment, or some other final disposition of the lost-debt claims—Bankers' injury will be ascertainable, an action as to the injury will accrue, and Bankers will then have four years to bring a civil RICO action to recover the damages it has suffered in this area, subject of course to the normal rules and procedures governing such claims.

c. *Future injury.* Bankers' complaint also alleges that it will continue to suffer future injury as it spends addi-

tional funds to trace lost assets and incurs ongoing legal fees and other expenses in the bankruptcy proceeding. As to these future expenses, however, Bankers has not yet suffered injury, and its claim therefor is yet to accrue. The trial court may, of course, permit supplementation of the complaint to allow for damages of this type suffered up to the time of trial. *Borger v. Yamaha International Corp.*, 625 F.2d 390, 398 (2d Cir. 1980); *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397, 401 (2d Cir. 1974). To recover future fees and expenses beyond that time, Bankers must wait until it suffers the injury.

In sum as to the statute of limitations issues, we reverse the district court and remand with the instruction that it reinstate Bankers' substantive and conspiracy claims against all defendants, but limit any recovery to damages for injuries which Bankers discovered or should have discovered on or after August 24, 1978. In addition, the district court shall dismiss any claim by Bankers to recover damages based on its unrecovered debt without prejudice to refiling after the bankruptcy court has finally disposed of the corporation's claim based on the same underlying transactions.

C. *Other Arguments.*

Three other arguments merit brief mention here. First, Bankers argues that because BAC is still controlled by defendants—Bankers should be allowed to bring its RICO claims to recover for its lost debt in spite of the ongoing bankruptcy proceedings. That this argument carries some weight cannot be contested—after all, it is unlikely that Rhoades, Soifer and Braten would initiate an action for breach of fiduciary duty against themselves—but Bankers presents this argument in the wrong forum. It is the bank-

ruptcy court, in the first instance, that has power to appoint a trustee, to order the claim abandoned by the trustee so that Bankers may proceed, or to grant some other relief from the automatic stay. Any argument and decision on this point should thus take place, in the first instance, in the bankruptcy court.

Second, Bankers contends that at most, its claims, which were dismissed by the district court, should only have been stayed. *See* 11 U.S.C. § 362(a)(3) (Supp. 1988). We need not reach this argument, however, because, as discussed above, Bankers' claims that arise after the beginning of the four-year limitations period fall into two groups: those that have accrued and those that have not. As to the former, the claims are reinstated. As to those that have not yet accrued, there is no action yet pending and therefore nothing to be stayed.

Finally, we reject Soifer's contention that the complaint does not sufficiently allege his participation in the 1978-79 or 1981-82 acts of the other defendants. At this early stage and in the absence of any meaningful discovery, Bankers has been unable to ascertain fully the extent of Soifer's participation in and knowledge of the bribery and 1982 frauds. Nevertheless, more than enough has been pled to raise an inference of Soifer's knowledge and participation.

The South Carolina corporation that Rhoades formed to assume the bribed judge's mortgage debt was beneficially co-owned by Soifer, and the moneys used to pay the bribe came from this corporation and from BAC (of which Soifer was not only a co-owner, but also an officer). BAC's assets were deliberately stripped away at a time when Soifer was its president, with some of these assets being transferred to other entities co-owned by Soifer, and over $4 million in cash being paid to or on behalf of Soifer

personally to enable a partnership of which he was a member to acquire real estate. In addition, at a time when revocation of BAC's bankruptcy reorganization was imminent, BAC's stock in Brookfield was transferred to another corporation beneficially co-owned by Soifer. These allegations are sufficient both under Fed. R. Civ. P. 12(b)(6) and 9(b). *See Bale v. Dean Witter Reynolds, Inc.*, 627 F. Supp. 650, 652 (D. Minn. 1986); *Kravetz v. Brukenfeld*, 591 F. Supp. 1383, 1388 n.9 (S.D.N.Y. 1984); *Green v. Hamilton International Corp.*, 437 F. Supp. 723, 729 (S.D.N.Y. 1977).

III. CONCLUSION

The judgment of the district court is reversed and the case is remanded.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 88-7054

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of November, one thousand nine hundred and eighty-eight.

BANKERS TRUST COMPANY,

Plaintiff-Appellant,

—v.—

DANIEL RHOADES, HERMAN SOIFER and MILTON BRATEN,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee HERMAN SOIFER.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 88-7054

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of October, one thousand nine hundred and eighty-eight

Present: Hon. Richard J. Cardamone,
Hon. George C. Pratt,
Hon. J. Daniel Mahoney,
Circuit Judges,

BANKERS TRUST COMPANY,

Plaintiff-Appellant,

—v.—

DANIEL RHOADES, HERMAN SOIFER and MILTON BRATEN,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is Reversed and the action be and it hereby is remanded to the district court for further proceedings consistent with the opinion of this court with costs to be taxed against the appellees.

ISSUED AS MANDATE: January 27, 1989

UNITED STATES DISTRICT COURT
S.D. NEW YORK

Dec. 22, 1987

No. 82 Civ. 5590 (WCC)

BANKERS TRUST COMPANY,

Plaintiff,

v.

Walter Feldesman, Daniel Rhoades, Herman Soifer, Milton Braten, Brookfield Clothes, Inc., Brookfield Industries, Inc., Bennington Court Ltd., Braxton Ltd., Aura By Laurie, Ltd., Erwin Commercial Corp., Michael B. Marks, Inc., Timely Textiles, Inc., Todd Equipment Leasing Co., Inc., and "John Does Nos. 1-50,"

Defendants.

OPINION AND ORDER

WILLIAM C. CONNER, District Judge.

This case is before the Court on defendants' motion pursuant to Rule 3(j) of the Local Civil Rules for an order granting reargument, and upon reargument, for dismissal of the complaint pursuant to Rules 9(b) and 12(b)(6), Fed.R.Civ.P. In the underlying motion defendants[1] moved for judgment on the pleadings under rule 12(c), Fed.R.Civ.P. Defendants advanced three arguments in support of the motion: (1) plaintiff Bankers Trust Co. ("Bankers Trust") did not adequately allege a pattern of racketeering activity, (2) Bankers lacks standing to assert a claim under the Racketeer Influenced and Corrupt Organiza-

1 Defendant Walter Feldesman was not a party to the motion, plaintiff having dismissed him from the case by stipulation dated March 4, 1983.

tions Act ("RICO"), and (3) Bankers' RICO claim was barred by the statute of limitations. On September 3, 1986 the Court ruled that plaintiff had adequately alleged the commission of a pattern of racketeering activity on the part of defendants Daniel Rhoades and Milton Braten, and the motion was denied as to them, 648 F.Supp. 17. The motion was granted as to the corporate defendants and they were dismissed from the case.[2] As to defendant Herman Soifer, the Court found a sufficient allegation of a pattern of racketeering activity, but dismissed the claim on the ground that it was barred by the statute of limitations. The Court did not dismiss the claim that Soifer conspired to violate RICO, finding that the action was timely in this regard. Plaintiff was granted leave to amend the complaint to plead a timely claim of racketeering activity against Soifer, and to plead a more specific RICO claim against the corporate defendants. Plaintiff repled with respect to Soifer, but did not replead with respect to the corporate defendants. For the reasons set forth below, defendants' motion is granted and the complaint is dismissed.

I. *Facts*

In deciding both the motion to dismiss under Rule 12(b)(6) and the reargument of the motion for judgment on the pleadings under Rule 12(c), the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972) (Rule 12(b)(6)); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir.1977) (Rule 12(c)). Bankers has alleged that the defendants engaged in various acts of bankruptcy fraud and bribery to prevent Bankers from recovering a debt owed by Braten Apparel Corporation ("BAC"), a corporation which the defendants controlled. BAC's debt to Bankers,

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2 Defendant Brookfield Clothes, Inc. ("Brookfield Clothes") did not join in the motion for judgment on the pleadings. Consequently, the complaint was not dismissed as to Brookfield Clothes. Walter Feldesman and the corporate defendants have all been previously dismissed from this case. Accordingly, collective references to defendants refer only to Daniel Rhoades, Herman Soifer and Milton Braten.

as of the date of this complaint, exceeds $4,000,000. At all relevant times BAC has been in the business of manufacturing, importing and selling goods in interstate commerce, resulting in net revenues in excess of $50,000,000 per year.

In August 1974, BAC owed substantial debts to Bankers and others, and had recently sustained severe losses. In an effort to avoid BAC's liability on its debts, Braten and Soifer, corporate officers of BAC, agreed to conceal BAC's recent acquisition of Brookfield Clothes, Inc. ("Brookfield Clothes") and to seek a discharge of its debts under Chapter XI of the Bankruptcy Reform Act of 1978.

To carry out this plan, Braten and Soifer executed a sham document hereinafter described as the shareholders' agreement. Pursuant to the shareholders' agreement BAC or Braten was required to furnish Brookfield Clothes with a $250,000 loan by a specified date, in default of which BAC's stock in Brookfield Clothes would be transferred to Soifer. Soifer and Braten, however, never intended that the $250,000 loan be furnished, and intended that BAC's creditors, upon being shown the shareholders' agreement and being told that the condition had not been met, would believe that BAC no longer had any interest in Brookfield Clothes. Braten and Soifer agreed that Soifer would hold Brookfield Clothes in a secret trust during the pendency of BAC's Chapter XI proceedings, and would return it to BAC after BAC had achieved the elimination or diminution of its debts through a confirmed plan of arrangement under Chapter XI. Braten and Rhoades also entered into a written agreement under which Rhoades, as attorney for Soifer, held stock in BAC to secure Braten's commitments to Soifer.

In furtherance of the scheme, Walter Feldesman, an attorney claiming to represent Soifer, misrepresented the validity of the shareholders' agreement to Bankers and to BAC's other creditors, and caused the transfer to Soifer of the Brookfield Clothes stock. Thereafter, on September 5, 1974, BAC filed a petition in Chapter XI before the United States District Court for the Southern District of New York, omitting BAC's ownership of the stock of Brookfield Clothes and omitting also the transfer of the stock to Soifer.

The defendants did not reveal the existence of the secret trust to Bankers, and between August 27, 1974 and March 9, 1976 they represented to Bankers and to the Bankruptcy Court that Braten did not furnish the $250,000 loan required by the shareholders' agreement. Consequently, Soifer appeared to own BAC's stock in Brookfield Clothes.

Bankers accepted a plan of arrangement in reliance on these omissions and misrepresentations, under which Bankers would receive only 17.5% of its allowed claim. Bankers' acceptance of the plan was necessary to obtain the assent of the majority of creditors, in terms of dollars owed, and therefore necessary to confirmation of the plan.

On March 12, 1976, the Bankruptcy Court issued an order confirming BAC's plan of arrangement. Consequently, BAC was relieved of more than $4.3 million in debts. At that time Brookfield Clothes had or anticipated sales of approximately $18 million per year, and net income in excess of $1.4 million per year. The stock of Brookfield Clothes was an asset of BAC worth more than $10 million. Had Bankers known that BAC owned Brookfield Clothes, Bankers would not have accepted the plan of arrangement. Likewise, if Bankers had discovered BAC's ownership of Brookfield Clothes between Bankers' acceptance of the plan and the court's confirmation order, then Bankers would have revoked its acceptance of the plan.

In August 1976 Soifer returned the Brookfield Clothes stock to BAC through a complicated series of transactions. Braten then transferred 45% of BAC's stock to Soifer in October 1976, in exchange for which Soifer gave Braten $25,000 in cash and a $450,000 note in July 1977. Braten then assigned the note to Rhoades.

Rhoades, acting on behalf of Soifer and together with Braten, commenced a series of lawsuits against Bankers in New York. These suits were intended to hinder and delay Bankers from collecting BAC's debt. In addition, in August 1977, BAC, by a South Carolina law firm to which Rhoades was counsel, instituted an action for damages against Bankers in South Carolina. This same firm was also representing BAC in a related South Carolina action in which BAC asserted claims to an escrow account in which Bankers had an interest. William

H. Ballenger was the presiding judge in both South Carolina actions.

In late 1978 and early 1979, Rhoades, through a South Carolina corporation which he formed and which Soifer and Braten owned, acquired or assumed a mortgage on which Judge Ballenger was personally obligated, and paid the Judge's debt as installments became due. Rhoades took these actions on behalf of himself, Braten and Soifer with the intention of thereby influencing the actions of Judge Ballenger in the litigation pending before him. As a result, Judge Ballenger rendered two decisions which were favorable to BAC: on January 18, 1979 Judge Ballenger appointed a special referee who was a former partner in the law firm representing BAC; and on November 9, 1978, Judge Ballenger denied Bankers' motion to dismiss the action for damages. These decisions caused Bankers to expend over $100,000 in legal fees.

In September 1976, Bankers commenced a proceeding to revoke BAC's confirmation of its Chapter XI arrangement as having been procured by fraud. This proceeding did not conclude until the bankruptcy court rendered its opinion on June 25, 1982, which held that defendants had procured the confirmation of BAC's plan of arrangement by fraud. During the pendency of that proceeding the defendants engaged in numerous acts which concealed and depleted the assets of BAC and Brookfield Clothes. On June 30, 1982, the bankruptcy court revoked the confirmation of BAC's plan of arrangement and reinstated the Chapter XI proceeding.

II. *Discussion*

On reargument defendants renew their contention that Bankers, as an individual creditor of BAC's estate in bankruptcy, lacks standing to assert a claim for damage under RICO. In support of the previous motion, defendants relied on *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.) *cert. denied*, ____ U.S. ____, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986), and *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910), in which creditors and shareholders were barred from suing to

redress injuries to a corporation. In denying defendants' motion, the Court distinguished those cases. The Court noted that Bankers was not suing to redress injuries to BAC, but rather to redress injuries Bankers suffered in its own right. Indeed, as alleged in Bankers' original complaint, BAC suffered no injury since defendants' actions ultimately enhanced BAC's assets. In addition, the Court concluded that the alleged bribery of Judge Ballenger, which caused Bankers to expend more than $100,000 in legal fees, resulted in a distinct injury to Bankers apart from any injury to BAC and its other creditors.

In their present motion, defendants argue that even though Bankers is not suing derivatively, its claimed injury is no different from that of other creditors, and therefore its cause of action belongs to the estate. Defendants rely on *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576 (N.D.Ill. 1986).

The plaintiff in *Dana* was a judgment creditor of the American Wheel and Engineering Co. ("American Wheel"). The complaint alleged that during American Wheel's Chapter XI reorganization, the president of American Wheel transferred all the corporate assets without consideration to a new corporation of which his son was president. The judgment creditor then brought a RICO action alleging bankruptcy fraud as a predicate act. Defendant moved to dismiss arguing that plaintiff, as a creditor of the bankrupt corporation, suffered only indirect injury as compared to the direct injury of the corporation, and therefore lacked standing to sue under RICO. Plaintiff responded that it had standing because it was asserting a claim on its own behalf rather than a claim derived from the corporation. The court rejected this argument stating,

> the predicate acts of racketeering on which plaintiff bases its claim all involve fraudulent transfers of money from American Wheel, and the injuries plaintiff asserts are indistinguishable from those suffered by American Wheel itself. Indeed, it is only in its capacity as a creditor of American Wheel that plaintiff has been injured at all. . . . In short, plaintiff has suffered no 'separate' injury from that inflicted on the bankruptcy estate. . . .

58 B.R. at 579.

The instant case is distinguishable from *Dana* as well. In *Dana*, the predicate acts upon which the plaintiff relied *all* involved fraudulent transfers of the bankrupt corporation's assets. In the case at bar, however, Bankers alleges it was injured as a result of the bribery of Judge Ballenger. Bankers claims to have incurred legal fees in excess of $100,000 defending the actions before Judge Ballenger. These legal fees constitute an injury that is distinct from the injury to BAC and to the other creditors, and which do not involve fraudulent transfers of BAC's assets. Therefore, it is clear that Bankers has standing insofar as it was injured by the alleged bribery of Judge Ballenger.

Bankers' other RICO injuries, however, are predicated on acts of bankruptcy fraud. *Dana* would deny recovery for these injuries. Like the plaintiff in *Dana*, Bankers claims injury as the result of defendants' scheme to conceal and misappropriate corporate assets. In this Court's previous decision, the Court held that since defendants' misdeeds had enhanced BAC's assets, Bankers was not suing derivatively to redress injuries to BAC. Bankers' third amended complaint, however, no longer alleges acts that enhanced BAC's assets. Instead, it alleges numerous acts by which defendants depleted BAC's assets. *See* Third Amd. Comp't ¶¶ 42-52. Consequently, the issue for decision on defendants' motion to dismiss the third amended complaint is whether a creditor may bring a civil RICO action against the officers of a bankrupt corporation for injury sustained as a result of actions which depleted the corporation's assets. The determination of this issue requires the resolution of an apparent conflict between two statutory provisions—the Bankruptcy Reform Act and RICO.

When a debtor files a petition for relief under the Bankruptcy Reform Act, all entities are automatically stayed from "any act to obtain possession of property of the estate or of property from the estate." 11 U.S.C. § 362(a)(3). Under § 541 of the Bankruptcy Code the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). These two provisions have been interpreted to bar creditors from suing to enforce the corporation's right to misappropriated corporate

assets. *See Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 436, 93 L.Ed.2d 385 (1986); *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1273-75 (5th Cir. 1983). This furthers the fundamental bankruptcy policy of equitable distribution among creditors. *Id.* Without these provisions an equitable distribution would be impossible since whoever sued first would obtain payments of their claims in preference to and to the detriment of other creditors. *See* H.R.Rep. No. 595, 95th Cong., 1st Sess. 340, *reprinted in* U.S.Code Cong. & Ad.News 1978 pp. 5787, 5963, 6296-97.

RICO, on the other hand, provides that any person who has been injured in his business or property by a pattern of racketeering activity may recover treble damages. Congress intended that RICO would afford a private remedy for persons harmed by the criminal exploitation of the bankruptcy laws. *See Criminal Laws and Procedures: Hearing on § 2187, 2188, 2189, 2190 & 2578 Before Subcommittee on the Judiciary*, 89th Cong. 2d Sess. 204 (1966). Accordingly, RICO provides that acts of bankruptcy fraud can form the basis of a pattern of racketeering activity. Certainly, a creditor is injured in his business or property when, as alleged in this case, the officers of a bankrupt corporation conceal and misappropriate corporate assets through bankruptcy fraud and other racketeering activity. Thus, RICO apparently permits recovery in situations which would violate the automatic stay and frustrate the equitable distribution of the estate.

When two statutes appear to conflict, every attempt should be made to interpret them so that each is given effect. The Court can achieve this by applying common law standing principles to RICO. This was the approach of the court in *Dana*, 58 B.R. at 580, and in numerous other cases throughout the federal courts. *See, e.g., Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986); *Warren v. Manufacturers National Bank*, 759 F.2d 542 (6th Cir. 1985); *Carter v. Berger*, 777 F.2d 1173 (7th Cir.1985); *Nordberg v. Lord, Day & Lord*, 107 F.R.D. 692 (S.D.N.Y. 1985).

Dana relied on the Seventh Circuit's opinion in *Carter*. There, taxpayers whose assessments were raised as a result of bribes made to the assessor's office sued the bribers under RICO. Judge Easterbrook, writing for a unanimous panel, reviewed a broad spectrum of cases and found that as a general rule the indirectly injured party may not sue. 777 F.2d at 1175. The court concluded that this principle should apply in RICO cases as well. *Id.* The court in *Dana* agreed, and held that a corporation's creditors could not assert a RICO claim based on injuries inflicted directly against the corporation. 58 B.R. at 580.

Bankers argues that *Dana* is not controlling because its claims in the instant case are for a pattern of actions and injuries that are unique to it and unrelated to any bankruptcy matter. Plaintiff directs the Court to *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037 (2d Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 436, 93 L.Ed.2d 385 (1986), in which the Second Circuit held that a creditor's fraud claim against the officer of a bankrupt corporation is not property of the estate.

In *Cumberland*, as here, the plaintiff alleged injury arising out of a fraud in which the defendants misrepresented the corporation's finances and then stripped the debtor corporation of its assets. Although mindful of the bankruptcy policy of equitable distribution of assets, the court concluded that it was inapplicable in the case before it. 791 F.2d at 1042. The court distinguished an action for fraud, which is a direct action, from a shareholder's derivative action or an action under the New York fraudulent conveyance statute, in which a third party sues to enforce the rights of the corporation. *See id.* at 1041-43. As plaintiffs have argued in the instant case, RICO, like an action for fraud, is a direct action. Therefore, they assert that they have standing under *Cumberland* to state a claim based on the misappropriation of BAC's assets.

Cumberland, however, is distinguishable on its facts. In *Cumberland* every creditor who had filed a claim with the bankruptcy court received full payment on their claims prior to the plaintiff's suit. 791 F.2d at 1040. In addition, the bankruptcy trustee had already vindicated the corporation's right to recover misappropriated corporate assets by suing the corporate offi-

cers. *Id.* at 1042. Therefore, plaintiff's recovery did not threaten to disrupt the equitable distribution of the corporation's assets. Here, by contrast, the creditors have not received full payment on their claims, nor has BAC sued the corporate officers under a misappropriation theory. In fact, the bankruptcy court has revoked BAC's plan of arrangement, and has yet to authorize a new distribution. *Cumberland*, therefore, is not controlling.

This Court finds *Dana* persuasive. Equitable distribution, the fundamental principle of bankruptcy, would be all but impossible if a creditor could employ RICO to recover misappropriated assets from the bankrupt's corporate officers during the pendency of a Chapter XI reorganization. Therefore, Bankers does not have standing to sue for any injury attributable to the depletion of BAC's corporate assets.

Plaintiff argues that it is entitled to sue under RICO because BAC is under the continuing control of the defendants. Plaintiff points to *Carter*, in which the Seventh Circuit stated in *dictum* that the injured party may have standing to sue when the directly injured victim is under the continuing control of the defendant. 777 F.2d at 1176. Plaintiff correctly notes that this is the case here. The bankruptcy court has not appointed a trustee to manage BAC's affairs during the Chapter XI proceedings: BAC is a debtor in possession, and its daily affairs are still managed by its corporate officers—defendants Soifer, Braten and Rhoades. Nevertheless, BAC's reorganization is still pending before the bankruptcy court. Consequently, Bankers can move the bankruptcy court to appoint a trustee. This would enable the trustee to sue to recover the misappropriated assets on behalf of BAC and all of BAC's creditors, thereby ensuring an equitable distribution. If the trustee fails to bring such an action, then Bankers could treat the claim as abandoned and could bring an action on its own behalf without threatening the principles underlying the Bankruptcy Code. *See Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129, 131 (2d Cir. 1984). As long as the bankruptcy case is open and Bankers is able to recover on its claim through the process of equitable distribution, however, a suit under RICO against BAC's corporate officers is inappropriate. Therefore, even though BAC is currently

under the control of the defendants there is no reason to allow Bankers to sue for the recovery of BAC's misappropriated assets.

Plaintiff argues that this result is contrary to Congress's intention that RICO provide a private remedy for persons harmed by the criminal exploitation of the bankruptcy laws. The result in this case, however, is consistent with Congress's intent. Bankers may still assert acts of bankruptcy fraud in support of its action under RICO, and Bankers has standing to assert a claim for those damages resulting from defendants' bribery of Judge Ballenger. Thus, Bankers may receive compensation for the harm it suffered as a direct result of defendants' bankruptcy fraud. Although the recovery is not as extensive as would be the case if Bankers were entitled to damages for the misappropriation of BAC's assets, this limitation is necessary to harmonize RICO with the Bankruptcy Code.

Defendants' motion for reargument also seeks reconsideration of the Court's ruling on the statute of limitations. In ruling on the original motion for judgment on the pleadings the Court held that a three-year statute of limitations would apply to civil RICO actions in New York. The Court also held that a RICO claim accrues for statute of limitations purposes when the plaintiff knows or has reason to know of the injury from the last predicate act on which he relies. The parties have not challenged these rulings on the motion for reargument. Applying these principles the Court concluded that the substantive RICO claim against Soifer accrued in September 1976, when Bankers discovered the first bankruptcy fraud and commenced a proceeding to set aside the confirmation of BAC's plan. Since Bankers waited until August of 1982 to commence this action, the three-year statute of limitations had long since expired. As to Braten and Rhoades, however, the original complaint alleged that they had taken actions to conceal BAC's assets within the limitations period. Thus the action was ruled timely as to them.

Under the third amended complaint, however, none of the substantive claims are timely as to any of the defendants. As stated above, the only acts of the defendants that give rise to an injury for which Bankers has standing to sue are those relating to the bribery of Judge Ballenger. This bribery resulted in two

decisions which caused Bankers injury. These decisions were rendered in November 1978 and January 1979. Bankers necessarily was aware of the injury caused by those rulings on or shortly after the date they were issued. Therefore, Judge Ballenger's January 1979 ruling is the last act on which Bankers may rely. Under the three-year statute of limitations, Bankers had to commence its RICO action to recover for these injuries by January 1982. Bankers, however, did not institute this action until August 1982. Consequently the substantive RICO claims are untimely as to all three defendants.

Bankers cannot claim that the payment of its own legal expenses at a later date constitutes a basis for postponing the accrual of its cause of action. A claim for damages accrues when the act causing the injury occurs, not when the injured party ceases to incur more damages. *See Korn v. Merrill*, 403 F.Supp. 377, 388 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 310 (2d Cir. 1976). If Bankers was able to postpone accrual of its claim until it had paid its legal expenses, then Bankers could keep its claim open indefinitely simply by protracting the litigation. This would be contrary to the purpose of the statute of limitations.

The Court found that a different accrual rule applies in the case of a continuing civil conspiracy. Under this rule, each time a member of the conspiracy commits an overt act in furtherance of the conspiracy, a cause of action accrues against all the persons who are then members of the conspiracy for the damages caused by that act. Membership in a conspiracy, once established, is presumed to continue until withdrawal is affirmatively shown. Therefore, since the original complaint alleged that within the limitations period Braten and Rhoades committed predicate acts which caused Bankers injury, and that those acts were committed in furtherance of a conspiracy of which Soifer was a part, Bankers' conspiracy claim was ruled timely even as to Soifer.

Under the third amended complaint, however, the acts that Braten and Rhoades allegedly committed during the limitations period did not cause Bankers to suffer a direct and distinct injury. It is well established that in a civil action for conspiracy the plaintiff may only recover for the injury caused by the specific acts—there is no recovery for the conspiracy itself. *Rutkin*

v. Reinfeld, 229 F.2d 248, 252 (2d Cir.), *cert. denied*, 352 U.S. 844, 77 S.Ct. 50, 1 L.Ed.2d 60 (1956); *Korry v. International Telephone & Telegraph Corp.*, 444 F.Supp. 193, 195 (S.D.N.Y. 1978). It is equally well established that a civil conspiracy claim accrues at the time of each injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971); *Rutkin*, 229 F.2d at 252; *Chodos v. Federal Bureau of Investigation*, 559 F.Supp. 69, 74 (S.D.N.Y.), *aff'd*, 697 F.2d 289 (2d Cir. 1982), *cert. denied*, 459 U.S. 1111, 103 S.Ct. 741, 74 L.Ed.2d 962 (1983). Under these principles, subsequent acts of a conspirator can support a new claim for injuries resulting from those acts, but they cannot postpone accrual of a claim seeking recovery for an earlier injury.

The Second Circuit explained the rationale underlying the accrual of civil conspiracy claims in *Rutkin v. Reinfeld*. There, the court ruled that a conspiracy claim brought under state law to recover for an injury in 1931 was untimely even though plaintiff claimed the conspiracy continued until commencement of the suit in 1948. Concluding that a claim for civil conspiracy accrues "as soon as the damage . . . is inflicted," the court reasoned that tolling the statute of limitations until termination of the conspiracy would "make a shambles of the statute of limitations and pervert its salutary purpose to set stale claims at rest." *Id.* at 252. In subsequent cases, the courts of this circuit have applied this accrual rule to civil conspiracy claims brought under the civil rights laws, *Singleton v. City of New York*, 632 F.2d 185, 192 (2d Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981), to civil conspiracy claims brought under the antitrust laws, *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F.Supp. 401 (S.D.N.Y. 1961), and to civil conspiracy claims brought under the False Claims Act. *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824 (S.D.N.Y.1986), *aff'd*, 817 F.2d 1007 (2d Cir.1987).

In *Compton v. Ide*, 732 F.2d 1429 (9th Cir.1984), the Ninth Circuit applied the same accrual rule to a civil conspiracy claim brought under RICO. The court reasoned that the statutory requirement that plaintiff suffer injury in its business or property suggests that the normal federal rule on accrual should apply to civil RICO actions alleging conspiracy. *Id.* at 1433.

In deciding Bankers' motion for judgment on the pleadings, this Court followed *Compton* and applied the general rule for the accrual of civil conspiracies. On reargument, the Court has not been persuaded that this was erroneous. Under the third amended complaint, however, Bankers has not alleged any legally cognizable injury within the applicable limitations period. Although Bankers alleges that Braten and Rhoades acted to further the conspiracy within three years of Bankers' complaint, none of those acts caused Bankers to suffer a direct and distinct injury. Consequently, the conspiracy claims are untimely.

III. *Conclusion*

For the foregoing reasons, defendants' motion to reargue is granted, and upon reargument defendants' motion to dismiss pursuant to rule 12(b)(6), Fed.R.Civ.P., is granted.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 CIVIL 5590 (WCC)

BANKERS TRUST COMPANY,

Plaintiff,

—against—

WALTER FELDESMAN, DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, et al.,

Defendants.

JUDGMENT

Defendants Rhoades, Soifer and Braten having moved for an order granting reargument, and upon reargument, for dismissal of the complaint, and the said motion having come before the Honorable WILLIAM C. CONNER, U.S.D.J., and the Court thereafter on December 22, 1987, having handed down its opinion and order (#62947); granting defendants' motion and dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

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UNITED STATES DISTRICT COURT
S.D. NEW YORK

Sept. 3, 1986

As Amended Feb. 4, 1987

No. 82 Civ. 5590 (WCC)

BANKERS TRUST COMPANY,

Plaintiff,

—v.—

WALTER FELDESMAN, DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE, LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., and "JOHN DOES Nos. 1-50,"

Defendants.

WILLIAM C. CONNER, District Judge:

Plaintiff Bankers Trust Company ("Bankers") commenced this action in August 1982 seeking to invoke the civil remedies of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982 & Supp. II 1984), to recover treble damages and attorney's fees for injuries suffered as a consequence of defendants' alleged bankruptcy frauds. In the spring of 1983, virtually all defendants[1] moved pursuant to rule 12(c), Fed.R.Civ.P., for judgment on the pleadings, arguing that the complaint was insufficient to state a civil claim under RICO. Defendant Herman Soifer ("Soifer") also con-

1 Plaintiff had dismissed its claims against defendant Walter Feldesman by stipulation endorsed by the Court on March 4, 1983. Defendant Brookfield Clothes, Incorporated did not join in the motions of the other defendants.

tended that the claims against him were barred by the statute of limitations or, if not, that they could be asserted only in pending bankruptcy proceedings.

In an Opinion and Order dated June 29, 1983, I granted the moving defendants' motions for judgment on the pleadings. *Bankers Trust Co. v. Feldesman*, 566 F.Supp. 1235, 1242 (S.D.N.Y.1983), *aff'd sub nom. Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir.1984), vacated, ____ U.S. ____, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985). Although I concluded that a private plaintiff seeking to invoke the civil remedies of RICO need not allege that the defendants are members of, or have ties to, organized crime, *id.* at 1239-40, I held that the plaintiff must allege that he has suffered a distinct RICO injury as opposed merely to a direct injury from the underlying predicate acts, *id.* at 1240-42. Because I found that Bankers' injuries were the direct result of the underlying predicate acts, and not a consequence of any independent pattern of racketeering activity, *id.* at 1242, I granted the moving defendants' motions to dismiss without considering the additional grounds advanced in support of the motions, *id.* at 1242 & n. 10.

Bankers appealed to the Second Circuit, and in July 1984, that court affirmed my decision. *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir.1984), *vacated*, ____ U.S. ____, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985). In July 1985, the Supreme Court decided two unrelated RICO actions, *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 349 (1985), and *American National Bank & Trust Co. v. Haroco, Inc.*, ____ U.S. ____, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). The Supreme Court also summarily vacated the Second Circuit's decision in this case and remanded the action to the court of appeals "for further consideration in light of" the Supreme Court's other RICO decisions. ____ U.S. ____, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985). By order dated September 23, 1985, the Second Circuit vacated my Opinion and Order and remanded the matter to me for further consideration of defendants' motions in light of the Supreme Court's actions in *Sedima* and *Haroco*. 779 F.2d 36 (2d Cir.1985) (mem.).

Following remand, defendants renewed their motions to dismiss on the additional grounds that I had previously found it

unnecessary to consider, and I permitted the parties to file briefs supplementing their earlier submissions. I have carefully considered the parties' submissions, and for the reasons set forth below, defendants' motions are granted in part and denied in part as indicated.

Background

The allegations of the complaint, which must be accepted as true for purposes of the present motions, *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir.1977); *Gumer v. Shearson, Hammill & Co., Inc.*, 516 F.2d 283, 286 (2d Cir.1974), are as follows: The principal actors in the scheme to defraud Bankers were the Braten Apparel Corporation ("BAC"), a corporation that owed Bankers some $4,000,000; defendant Milton Braten ("Braten"), an officer and principal shareholder of BAC; defendant Daniel Rhoades ("Rhoades"), an officer, director, and/or shareholder of BAC, and an attorney for BAC and Braten; defendant Soifer, a shareholder of BAC; and Walter Feldesman ("Feldesman"), an attorney who represented BAC, Soifer, and defendant Brookfield Clothes, Incorporated ("Brookfield"). Braten, Rhoades, and Soifer were also officers, directors, and/or shareholders of all of the other corporate defendants named in the complaint.

In August 1974, at a time when BAC had recently sustained severe financial losses and owed substantial debts to Bankers and others, BAC acquired all of the stock of Brookfield, which at that time had a net worth of more than $3,000,000. Complaint ¶ 11. Braten, Soifer, and Feldesman allegedly made a secret agreement to conceal this acquisition for the purpose of obtaining a favorable discharge of BAC's debts by pursuing chapter XI proceedings in the bankruptcy court. *Id.* ¶ 13.

To implement the plan, Braten and Soifer executed a sham "Shareholder's Agreement," drafted by Feldesman, which provided that if BAC or Braten did not furnish a $250,000 loan to Brookfield by a specified date, BAC's stock in Brookfield would automatically be transferred to Soifer. *Id.* ¶¶ 14-15. At the time this agreement was entered into, Braten, Feldesman,

and Soifer knew that the funding condition would not be met. They intended that Soifer would hold the stock of Brookfield, safe from the claims of BAC's creditors, only during BAC's bankruptcy proceedings; Soifer was to return the stock to BAC following the corporation's discharge in bankruptcy. *Id.* ¶¶ 16-17.

On September 5, 1974, BAC's stock in Brookfield was transferred to Soifer and BAC filed its petition in bankruptcy. *Id.* ¶ 18. BAC did not list the Brookfield stock as an asset. *Id.* Braten, Rhoades, Soifer, and Feldesman thereafter affirmatively misrepresented to Bankers and the bankruptcy court that BAC had, through failure to meet the Shareholder's Agreement funding condition, lost its ownership of the Brookfield stock. *Id.* ¶¶ 19-20. Through this and related misrepresentations, Feldesman and the individual defendants induced BAC's creditors, including Bankers, to approve a plan of arrangement under which Bankers would receive only 17.5% of its claims and BAC would be relieved of more than $4.3 million of its debts. *Id.* ¶¶ 21-22. Had BAC's stock in Brookfield been included in BAC's plan of arrangement, BAC would have had assets sufficient to satisfy Bankers' claims in full. *Id.* ¶¶ 23-24.

BAC's plan of arrangement was approved by the bankruptcy court on March 12, 1976. *Id.* ¶ 22. In August 1976, Soifer returned the Brookfield stock to BAC through a complicated sequence of stock transfers. *Id.* ¶ 25. Soifer, Braten, and Rhoades then revealed to Brookfield's auditors that BAC had in fact owned this stock all along. *Id.* ¶ 26. In October 1976, Soifer purchased 45% of the stock of BAC. *Id.* ¶ 27. In July 1977, Soifer gave Braten a $450,000 note in part payment for the BAC stock. *Id.*

In September 1976, Bankers commenced a proceeding in the bankruptcy court under section 386 of the Bankruptcy Act of 1898, former 11 U.S.C. § 786, to revoke the confirmation of BAC's plan of arrangement because of the fraudulent concealment of BAC's ownership of the Brookfield stock. *Id.* ¶ 28. On June 25, 1982, following lengthy proceedings including a trial, the bankruptcy court revoked the confirmation, *see In re Braten Apparel Corp.*, 21 B.R. 239 (Bankr.S.D.N.Y.1982), finding that the individual defendants had devised and carried out a

scheme to defraud by making false statements and oaths in BAC's listing of the assets of the estate, and by intentionally concealing property of BAC. *Id.* ¶¶ 42-43. The bankruptcy court ordered BAC to "offer a plan which is realistic . . . in light of the fact that [it] owns a valuable asset—Brookfield." 21 B.R. at 263. The bankruptcy court's decision was affirmed by the district court, *In re Braten Apparel Corp.*, 26 B.R. 1009 (S.D.N.Y.1983), and the district court's decision was affirmed by the court of appeals by summary order entered on September 1, 1983, *In re Braten Apparel Corp.*, 742 F.2d 1435 (2d Cir.1983) (mem.).

In the meantime, however, BAC had entered into a new scheme to protect many of its assets from its creditors. Its principal action, again, was to transfer its stock in Brookfield. *Id.* ¶ 41. In January 1982, defendant Bennington Court Limited ("Bennington") borrowed almost nine million dollars from KB Business Credit, Incorporated ("KBBC"), a financing company. *Id.* ¶ 36. Bennington then gave these funds to several of the other defendants in this case. *Id.* When the funds were not repaid, KBBC brought a civil RICO action for treble damages against BAC, Braten, Rhoades, and others. *Id.* ¶¶ 37-38. The defendants quickly settled the lawsuit by having BAC convey its stock in Brookfield—for little or no consideration—to defendant Todd Equipment Leasing Company, Incorporated ("Todd"), which in turn pledged the stock to KBBC. *Id.* ¶¶ 39-40. As a result, BAC was able to frustrate Bankers' attempt in the bankruptcy court to obtain some benefit from BAC's earlier ownership of the stock of Brookfield.

Bankers also alleges that during the perpetration of BAC's initial bankruptcy fraud, BAC and the individual defendants instituted several frivolous lawsuits against Bankers in New York state court, alleging that Bankers had breached a commitment to extend additional credit to BAC and seeking millions of dollars in damages. *Id.* ¶ 29. The only purpose of these suits was to hinder Bankers' collection of the debt owed to it by BAC. *Id.* Each suit was summarily dismissed, but not before Bankers had incurred substantial legal expenses. *Id.*

In August 1977, BAC instituted an action against Bankers in South Carolina based on claims similar to those asserted in the

New York actions, seeking $195 million in damages. *Id.* ¶ 30. Braten brought another action in South Carolina, asserting claims, allegedly superior to those of Bankers, to funds in an escrow account derived from the sale of machinery in which Bankers had a security interest. *Id.* Rhoades acted as counsel to a South Carolina law firm representing BAC and Braten in these actions and, according to the complaint, proceeded to bribe William H. Ballenger, the judge before whom the actions were pending. *Id.* ¶¶ 30-34.

Rhoades allegedly used a South Carolina corporation formed by him to assume a mortgage debt on which Judge Ballenger was personally liable to the extent of $100,000. *Id.* ¶ 32. Rhoades thereafter made payments on the debt as installments came due. *Id.* Rhoades' actions induced Judge Ballenger to render at least two decisions favorable to Braten and BAC: (1) in Braten's action to collect from the escrow account, Judge Ballenger appointed a former partner of the law firm to which Rhoades was counsel as a "special referee" with the power to deny Bankers a jury trial; and (2) in BAC's $195 million damage action, Judge Ballenger arbitrarily denied Bankers' motion to dismiss. *Id.* ¶ 33. Judge Ballenger eventually recused himself from the escrow account action after citing a "possible conflict of interest," and his special referee resigned. *Id.* ¶ 34. In the BAC action, the South Carolina Supreme Court reversed Judge Ballenger's denial of Bankers' motion to dismiss as an abuse of discretion. *Id.* In the meantime, however, Bankers had expended more than $100,000 in defending the South Carolina cases. *Id.*

Discussion

As noted above, the moving defendants advance a number of grounds in support of their motion for judgment on the pleadings: (1) Bankers has not adequately alleged a pattern of racketeering activity, (2) Bankers' RICO claim belongs to BAC and may be asserted only by BAC's trustee in the pending bankruptcy proceeding, and (3) Bankers' RICO claim is time-barred regardless of which statute of limitations is applicable. I address each of these arguments in turn below.

Pattern Allegations

Each defendant has moved for judgment on the pleadings on the ground that Bankers has not adequately alleged a pattern of racketeering activity as required by RICO. Section 1964(c) provides a civil remedy to "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (1982). Section 1962 makes it unlawful (1) to use income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce, *id.* § 1962(a); (2) to acquire or maintain an interest in such an enterprise "through" a pattern of racketeering activity, *id.* § 1962(b); or (3) to conduct or participate in the conduct of such an enterprise through a pattern of racketeering activity, *id.* § 1962(c). *Sedima*, 105 S.Ct. at 3278. Section 1962(d) prohibits conspiring to violate any of these three provisions. *Id.* A "pattern of racketeering activity" "requires" the commission of "at least two acts of racketeering activity." 18 U.S.C. § 1961(5). The enumerated acts of racketeering activity include nine state law felonies and the violation of more than 25 federal statutes. *Id.* § 1961(1).

Bankers has alleged that defendants violated each of the three subdivisions of section 1962 and conspired to do so. Complaint ¶¶ 50-53. Bankers contends that it has sufficiently alleged a pattern consisting of three acts of bankruptcy fraud and one act of bribery: (1) the fraudulent conveyance of the Brookfield stock to Soifer in 1974 in contemplation of BAC's bankruptcy, Complaint ¶¶ 44, 49; (2) the making of false oaths in BAC's schedules and the giving of false testimony under the penalty of perjury, Complaint ¶¶ 45, 49; (3) the 1982 conveyance of the Brookfield stock to Todd and Todd's pledging that stock to relieve the defendants of personal liability in connection with the KBBC lawsuit, Complaint ¶¶ 48-49; and (4) the bribery of Judge Ballenger, Complaint ¶¶ 47, 49.

Soifer contends that Bankers has not alleged that he committed two predicate acts. There is no dispute that he is named in the complaint in connection with the first two predicate acts listed above. *See* Complaint ¶¶ 11-20. It is equally clear that there are no allegations directly implicating Soifer in the com-

mission of predicate acts three and four above. Indeed, the complaint does not allege that he played any active role in the scheme to defraud Bankers after the confirmation of BAC's plan of arrangement in 1976.[2]

Soifer asserts that even though he is alleged to have participated in both the initial fraudulent conveyance and the subsequent concealment of the Brookfield stock, those acts are in reality a single offense. Soifer argues that Bankers has impermissibly attempted to split a single violation of the bankruptcy fraud statute, 18 U.S.C. § 152 (1982), into separate offenses in order to allege the requisite two predicate acts. He contends that the commission of multiple acts proscribed by § 152 constitutes a single criminal offense so long as the acts involve the same asset of the debtor. Supplemental Reply Memorandum of Law of Defendant Herman Soifer at 3. I disagree.

It is well settled that violations of more than one provision of § 152 are separately indictable offenses even if they pertain to the same asset of the debtor. *See, e.g., United States v. Gordon*, 379 F.2d 788, 790 (2d Cir.), *cert. denied*, 389 U.S. 927, 88 S.Ct. 286, 19 L.Ed.2d 277 (1967). In *Gordon*, our court of appeals observed that the separate paragraphs of the bankruptcy fraud statute, 18 U.S.C. § 152 (1982), "create separate crimes, the violation of which may be indicted separately." 379 F.2d at 790. It is true that a defendant cannot be separately convicted of violating § 152 by concealing an asset during bankruptcy, and of violating § 152 by filing a schedule with the bankruptcy court that is false because it does not disclose the same asset.

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2 Bankers' allegations with respect to the 1982 bankruptcy fraud are contained in paragraphs 36 through 40 of the complaint. These paragraphs contain only one indirect reference to Soifer. He is one of several people alleged to have been a beneficial owner of Capital Aid Corporation; that corporation in turn is alleged to have owned Todd, the company through which the Brookfield stock was pledged to KBBC. Bankers does not allege that Soifer received any of the funds borrowed from KBBC, and Soifer was not named as a defendant in the KBBC lawsuit. Similarly, the allegations concerning the frivolous lawsuits and the bribery of Judge Ballenger are contained in paragraphs 29 through 34 of the complaint. These paragraphs make no reference to Soifer, either direct or indirect. All of the allegations concern Braten, Rhoades, and BAC.

See, e.g., United States v. Ambrosiani, 610 F.2d 65, 68-69 (1st Cir.1979), *cert. denied*, 445 U.S. 930, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980). The filing of the false schedule is simply the means by which the asset was concealed during bankruptcy. However, it is clear that a defendant may be separately indicted for fraudulently transferring an asset and subsequently concealing the same asset by making false statements. *See Gordon*, 379 F.2d at 790; *accord Ambrosiani*, 610 F.2d at 68. This is precisely the situation presented here. Bankers has alleged that the Brookfield stock was fraudulently conveyed to Soifer who concealed it in contemplation of BAC's bankruptcy, and that Soifer concealed the stock from BAC's trustee and the bankruptcy court during bankruptcy by making false statements. There can be little doubt that this is sufficient to allege two separate violations of the bankruptcy fraud statute, and hence two separate acts of racketeering activity.

Soifer next contends that even if Bankers has adequately alleged two separate acts of racketeering activity, those acts do not constitute a pattern. He relies on a number of post-*Sedima* decisions embellishing (and thereby narrowing) RICO's pattern requirement. These cases represent the latest attempt to limit the "extraordinary uses to which civil RICO has been put," *Sedima*, 105 S.Ct. at 3287. I am not unsympathetic to the desire of federal judges "to dam the flood of civil RICO cases which on their face look like basic common law breach of contract and fraud cases." *Papai v. Cremosnik*, 635 F.Supp. 1402, 1406 (N.D.Ill.1986). Indeed, as noted above, this Court was among many courts in holding pre-*Sedima* that RICO required proof of a racketeering injury and not merely a direct injury from the underlying predicate acts. Other courts focused on other doctrines in order to limit the reach of the statute. For example, some courts required a "nexus to organized crime," *see, e.g., Moss v. Morgan Stanley Inc.*, 553 F.Supp. 1347, 1361 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir.1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984); *Noonan v. Granville-Smith*, 537 F.Supp. 23, 29 (S.D.N.Y.1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 112-13 (S.D.N.Y.1975), while other courts sought to limit "enterprise" to "legitimate business enterprises," *see, e.g., United*

States v. Turkette, 632 F.2d 896, 903 (1st Cir.1980), *rev'd*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

However, the Supreme Court in *Sedima* stated clearly that such doctrines have no reasonable basis in the language of the statute, 105 S.Ct. at 3284-85, and that any change in the statute must come from Congress, *id.* at 3287. The Court also emphasized:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes." The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

105 S.Ct. at 3286 (citations omitted).

Despite this clear admonition, some courts have construed other language in *Sedima* as an invitation to continue the restriction of the statute on the "pattern" front. In particular, they have focused on the Court's observation that "[t]he 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offense, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern,' " 105 S.Ct. at 3287. They also rely on the Court's comments in footnote 14. There the Court stated:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance, two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus

> not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

Sedima, 105 S.Ct. at 3285 n. 14 (emphasis in original).

The courts that have adopted a restrictive view of pattern have focused principally upon the reference to 'continuity" in footnote 14, and have concluded that "pattern" requires multiple criminal "episodes" or "transactions" "sufficiently unconnected in time" yet not "isolated" or "sporadic." *See, e.g., Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F.Supp. 1198, 1200-01 (S.D.N.Y.1986); *Soper v. Simmons Int'l, Ltd.*, 632 F.Supp. 244, 253-54 (S.D.N.Y.1986).

Other courts reject this restrictive view. They focus mainly on the perceived concern in footnote 14 that RICO not be used to reach sporadic or isolated activity, and require only that the predicate acts be related. *See, e.g., Conan Properties v. Mattel, Inc.*, 619 F.Supp. 1167, 1171 (S.D.N.Y.1985).

For a number of reasons, I find myself in agreement with this less restrictive approach. First, footnote 14 simply is not a basis for the doctrine that has arisen from it. The footnote makes no mention of multiple "episodes," "transactions," or "schemes." The primary if not the sole focus of footnote 14 is on the need for some relationship between the predicate acts constituting the pattern. Thus, the Court quotes 18 U.S.C. § 3575(e) (1982), which requires only a connection between criminal acts. In addition, the Court quotes the Senate Report on RICO as supportive of the proposition that "two isolated acts of racketeering activity do not constitute a pattern." The Senate Report states:

> The concept of "pattern" is essential to the operation of the statute. *One isolated "racketeering activity" was thought insufficient* to trigger the remedies provided . . . largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires *more than one 'racketeering activity' and the threat of continuing activity* to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.

Organized Crime Control Act of 1969, S.Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (emphasis added). It seems clear from this language that the continuity aspect is satisfied by the existence of a second predicate act, and that the relationship aspect is satisfied by some connection between the acts.

Second, the so-called "episode" test is vague and unpredictable. As Judge John F. Grady observed in *Brainerd & Bridges v. Weingoff Enterprises, Inc.*, No. 85 Civ. 493 (JFG) (N.D.Ill. July 22, 1986), some courts have found one episode in fact situations where others have not, leading to inconsistent results. In addition, the episode test places undue emphasis on the way predicate offenses are portrayed in pleadings. *See Litigating the Pattern Element in Civil RICO Cases*, Nat'l L.J., Sept. 1, 1986, at 20. Finally, I am concerned that the episode test is overbroad, and may eliminate from RICO's ambit some cases Congress surely meant to include. For example, under the episode

test an act of arson followed by an attempt to extort money from the victim by telephone would undoubtedly be considered a single episode, yet surely this is the sort of conduct that Congress sought to reach. I agree with Judge Grady that the "episode" test smacks of an "I know it when I see it" approach, and find such a vague and unpredictable test unacceptable. *See Brainerd & Bridges*, slip op. at 16. Accordingly, I conclude that until Congress indicates otherwise, a pattern of racketeering activity is alleged when a plaintiff claims two or more connected criminal acts listed in § 1961(1). *Accord Conan Properties v. Mattel, Inc.*, 619 F.Supp. 1167, 1171 (S.D.N.Y.1985); *see also Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir.1986); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir.1985); *Tryco Trucking Co., Inc. v. Belk Stores Servs., Inc.*, 634 F.Supp. 1327, 1334 (W.D.N.C.1986).

Under this standard, Bankers' pattern allegations are clearly sufficient. Bankers has alleged that the Brookfield stock was fraudulently conveyed to Soifer who concealed it in contemplation of BAC's bankruptcy, and that Soifer concealed the stock from BAC's trustee and the bankruptcy court during bankruptcy by making false statements. Each of these acts constituted bankruptcy fraud, and the acts are clearly connected.

As noted above, Braten and Rhoades also challenge the sufficiency of Bankers' pattern allegations. They press the same points as Soifer. These arguments are even more unavailing when applied to the allegations against these defendants. Braten and Rhoades are alleged to have played major roles in the commission of each of the four predicate acts set out above. There is no question that Bankers has adequately alleged a pattern as to Braten and Rhoades.

The situation with respect to the other moving defendants is quite different, however. These defendants are various corporate entities of which Braten, Rhoades, and Soifer are alleged to be officers, directors, and/or shareholders and for which Rhoades served as counsel. The only specific references to any of these defendants are in connection with the 1982 bankruptcy fraud. Some of them are never mentioned by name. Because the complaint contains numerous collective references to "the

defendants," it is impossible to determine whether they are alleged to have played any part in the initial bankruptcy fraud or the bribery of Judge Ballenger. Standing alone, the pledging of the Brookfield stock in 1982 is insufficient to constitute a RICO pattern. Accordingly, Bankers' complaint is dismissed as against the corporate defendants for failure to allege a pattern of racketeering activity with sufficient particularity. Bankers may replead within thirty days if it can allege with more specificity that any of these defendants actively engaged in two or more predicate acts of racketeering activity. If Bankers chooses to replead, it should separately number and state its allegations as to each corporate defendant, rather than lumping them together and referring to them collectively as "the defendants."

Standing to Assert the RICO Claim

Defendants next contend that Bankers' RICO claim belongs to BAC, and may be asserted only by BAC's trustee in the pending bankruptcy proceeding. This contention is also without merit. *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.1986), and *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir.1910), on which defendants rely, hold that an action to redress injuries to a corporation cannot be maintained by a creditor or a shareholder in his own name, but rather must be brought in the name of the corporation. However, those cases are inapposite. In this case, Bankers is not suing derivatively to redress injuries to BAC, but rather to redress injuries Bankers suffered in its own right. BAC was not harmed by the 1976 bankruptcy fraud. It had more assets after the confirmation that it would have had absent defendants' fraudulent acts. Moreover, Bankers' RICO claim is also based upon the bribery of Judge Ballenger, which caused Bankers to expend more than $100,000 in defending frivolous lawsuits. Defendants engaged in these acts to benefit BAC, not to harm it, and the resulting injury was suffered only by Bankers and not by BAC. Defendants' contention that "legal expense is not damage" is clearly meritless. Accordingly, I conclude that Bankers does not lack standing to assert the instant civil RICO claim.

The Statute of Limitations for Civil RICO Claims

Finally, defendants contend that Bankers' RICO claim is barred by the applicable statute of limitations. The Racketeer Influenced and Corrupt Organizations Act does not contain a specific statute of limitations governing civil RICO actions—" 'a void which is commonplace in federal statutory law.' " *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 1942, 85 L.Ed.2d 254 (1985) (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 483, 100 S.Ct. 1790, 1794, 64 L.Ed.2d 440 (1980)). When Congress has not established a limitation period for a federal cause of action, the settled practice is to "borrow" the most analogous statute of limitations of the forum state if it is not inconsistent with federal law or policy to do so. *See, e.g., id.* at 1942-43; *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84, 488, 100 S.Ct. 1790, 1794-95, 1797, 64 L.Ed.2d 440 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975); *see generally* Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L.Rev. 1127 (1979).

Defendants urge the Court to apply the three-year New York statute of limitations governing actions to enforce a liability created by statute, N.Y.Civ.Prac.Law § 214(2) (McKinney 1972). They rely on *Durante Bros. & Sons, Inc. v. Flushing National Bank*, 755 F.2d 239 (2d Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 3530, 87 L.Ed.2d 654 (1985), for the proposition that § 214(2) is to be applied to all civil RICO claims arising in New York regardless of the factual basis of the particular claim. On the other hand, Bankers would have the Court apply the six-year New York statute of limitations governing actions based on fraud, N.Y.Civ.Prac.Law § 213(8) (McKinney 1972). It contends that *Durante* does not endorse the uniform application of a three-year statute of limitations to all civil RICO actions. According to Bankers, courts must instead select an appropriate limitation period for each RICO claim based upon the nature of the underlying predicate acts.

Unfortunately, *Durante*, the only case in which our court of appeals has considered the borrowing of statutes of limitations for RICO claims, does not resolve this question. In *Durante*,

the plaintiff brought a civil RICO action predicated upon the alleged collection of an unlawful debt. The district court concluded that the most analogous statute of limitations was the one-year New York statute governing actions to recover an overcharge of interest, N.Y.Civ.Prac.Law § 215(6) (McKinney 1972), and dismissed the plaintiff's suit as time-barred. The court of appeals reversed. It pointed out that the district court's seemingly apt analogy dissolved when the elements of the RICO claim were closely examined. The court observed that the plaintiff would have to prove no fewer than ten elements to make out his RICO claim while he could establish a state law claim governed by § 215(6) by proving only one of them. The court then concluded,

> There being no state law analog to the present civil RICO claim, we conclude that the most appropriate state statute of limitations is that found in CPLR § 214(2), governing actions to enforce a liability created by statute.

755 F.2d at 249.

Since *Durante* was decided, three judges in this district have addressed the borrowing of statutes of limitations for civil RICO actions. Each judge was faced with the difficult question of whether a uniform statute of limitations should be applied to all RICO claims or whether the appropriate limitation period should be determined on a case-by-case basis. In *Fustok v. Conti-Commodity Services, Inc.*, 618 F.Supp. 1076 (S.D.N.Y. 1985), the plaintiff brought a civil RICO action alleging that various defendants had engaged in a pattern of racketeering activity through the commission of predicate acts of mail and wire fraud. On the eve of trial, the defendants moved to dismiss the RICO claim as time-barred, relying on *Durante* for the proposition that the three-year limitation period of CPLR § 214(2) is uniformly applicable to all civil RICO claims regardless of the underlying predicate offense. The plaintiff opposed the motion, arguing that the statute of limitations applicable to civil RICO claims varies with the offense underlying each RICO claim. Judge Lasker noted that he found the *Durante* opinion "puzzling in that it [was] not clear to [him] whether the court intended to establish a general rule for RICO limitation

periods," and observed that "in any event the opinion does not state a rule of general applicability *in haec verba*." 618 F.Supp. at 1081. Because *Durante* did not settle the question before him, Judge Lasker turned to the pre-*Durante* decisions of the district judges in this circuit, and to district and circuit court decisions in other circuits. Although he found both groups of decisions divided, he nonetheless concluded that there was "considerable authority . . . to support the proposition that the New York statute of limitations governing the state action which most closely resembles the basis for the RICO claim should apply." *Id.* Judge Lasker therefore chose the six-year New York period of limitation governing actions based on fraud.[3]

In *Von Bulow v. Von Bulow*, 634 F.Supp. 1284 (S.D.N.Y. 1986), Judge Walker was faced with the same question that had arisen in *Fustock*. He found it unnecessary to resolve the issue, however, because he concluded that, due to tolling, the action was timely regardless of what period was applicable. Nonetheless, Judge Walker noted in dictum that he was "inclined to the view that the Second Circuit did not intend a uniform rule and to agree with Judge Lasker in *Fustock*." *Id.* at 1301.

The only other post-*Durante* decision in this district to address the appropriate statute of limitations to apply to civil RICO claims is *Bartels v. Clayton Brokerage Co. of St. Louis, Inc.*, 631 F.Supp. 442 (S.D.N.Y.1986). The plaintiffs in *Bartels* brought a civil RICO action alleging that defendants had committed predicate acts of mail and wire fraud in furtherance of a commodities fraud scheme. While acknowledging that the general rule when a federal statute does not specify a limitation

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3 It is not clear to what extent Judge Lasker based his decision on "strong, practical considerations." Judge Lasker noted that the case was "about ready to go to trial," "that the bulk of discovery [had] been completed," and that proof of the RICO allegations would not add significantly to the length of the trial. In contrast, he observed that "[d]ismissal of the RICO claim would run the risk of a costly retrial in the event that the Court of Appeals subsequently clarifies its position on the appropriate limitations period in agreement with plaintiff's understanding." "Bearing in mind these legal and policy considerations," Judge Lasker concluded that the motion to dismiss the RICO claim as time-barred should be denied. 618 F.Supp. at 1081.

period is to borrow an analogous state statute of limitations, Judge Goettel observed that "when federal policies are at stake, courts have not hesitated to look for a timeliness rule in federal law that provides a closer analogy." *Id.* at 449 (citing *Del-Costello v. International Bhd. of Teamsters*, 462 U.S. 151, 171-72, 103 S.Ct. 2281, 2294-95, 76 L.Ed.2d 476 (1983)). Judge Goettel noted that the RICO statute envisions a *national* policy to fight organized crime, and concluded that its enforcement should therefore proceed in as uniform a manner as possible. In view of the need for uniformity in administering civil RICO actions and the fact that the plaintiffs' allegations rested on violations of the Commodities Exchange Act ("the CEA"), Judge Goettel found it proper to borrow the two-year statute of limitations governing private actions under the CEA. Although this is not clear from Judge Goettel's opinion, it appears likely that he was suggesting that, where the predicate offenses are federal, courts should choose the appropriate federal statute of limitations rather than the state statute applicable to the most analogous state claim. *But see A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 337-41 (3d Cir.1986) (Sloviter, J., concurring in the judgment) (arguing that the four-year federal statute of limitations applicable to claims under the Clayton Antitrust Act should be applied to all civil RICO claims), *discussed infra* note 3. Thus, it would appear that, like Judges Lasker and Walker, Judge Goettel has endorsed a case-by-case determination of the appropriate statute of limitations for each civil RICO action.

In view of these cases, I am faced with two immediate questions. First, whether to fill the void in the RICO statute by adopting a state statute of limitations or a federal one. And second, regardless of the source of the statute, whether to borrow the same statute for all RICO claims, no matter what their factual underpinnings, or to choose the appropriate statute based on an examination of the factual circumstances presented in each case.

Durante at least suggests the answer to the first of these questions. The court of appeals began its discussion of the statute of limitations question with the observation that "[s]ince RICO does not contain its own statute of limitations, and there is no

other apparently relevant federal statute of limitations for RICO claims, the [district] court was required to apply the most appropriate limitations period provided by state law." 755 F.2d at 248 (citing *Board of Regents v. Tomanio*, 446 U.S. 478, 485, 100 S.Ct. 1790, 1795-96, 64 L.Ed.2d 440 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975)). The court was presumably aware of and rejected the option of borrowing from a federal statute. In addition, the great weight of authority is that state law is the appropriate source from which to borrow the limitation period for civil RICO claims. *See A.J. Cunningham*, 792 F.2d at 338 (Sloviter, J., concurring in the judgment); A.B.A. Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Task Force on Civil RICO* 387 (1985) [hereinafter cited as "*A.B.A. Civil RICO Report*"]. To the Court's knowledge, only Judge Goettel, in *Bartels v. Clayton Brokerage Co. of St. Louis, Inc.*, 631 F.Supp. 442 (S.D.N.Y.1986), and Judge Sloviter, concurring in the judgment in *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330 (3d Cir.1986),[4] have looked to federal law. *Cf. Creamer v. General Teamsters Local Union 326*, 579 F.Supp. 1284 (D.Del.1984) (considering and rejecting the contention that a statute of limi-

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4 Judge Sloviter filed opinions concurring in the judgment of the panel in both *A.J. Cunningham* and its companion case, *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir.1986), *discussed infra* pp. 485-488. She characterized civil RICO "as a congressionally provided remedy for repeated criminal behavior that results in economic injury," and noted that the "civil remedy provided in the Clayton [Antitrust] Act has a similar purpose." *A.J. Cunningham*, 792 F.2d at 340. Judge Sloviter went on to note the strong analogy between the two:

> Both section 4 of the Clayton Act and the civil enforcement provision of RICO provide for the recovery of three-fold damages and the cost of suit including a reasonable attorney's fee. Both require the plaintiff to prove an injury "in his business or property by reason of" a violation. Moreover, Congress explicitly used the Clayton Act as the model for the civil provisions of RICO.

Id. (citations omitted). Judge Sloviter also found it "more satisfying intellectually to apply [a statute of limitations] to which Congress has given its specific attention, as it did when it amended the Clayton Act to provide a four

tations under the National Labor Relations Act should apply to a RICO claim involving labor union activities). Finally, even in *DelCostello*, where the Supreme Court chose a federal statute, it stated that "resort to state law remains the norm for borrowing of limitations periods," 462 U.S. at 171, 103 S.Ct. at 2294, and that "absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions," *id.* at 158 n. 12, 103 S.Ct. at 2287 n. 12. I am not persuaded that the nature of civil RICO claims is such that courts should look to federal rather than state law.

Having decided to borrow a state statute of limitations, I turn to the second question set out above—namely, whether to treat all civil RICO claims similarly, without considering the factual circumstances presented in each case, and to apply the same statute of limitations to all RICO claims, or to characterize each RICO claim on the basis of its particular factual underpinnings and to apply that statute which is most analogous in each case. On this question, I agree with Judges Lasker and Walker that *Durante* is not dispositive. As Judge Lasker noted in *Fustock*, the court of appeals did not seem to be announcing a rule for all civil RICO cases. Rather, it would appear to have been concerned simply with the one case before it. On the other hand, I note that it would not be inconsistent with *Durante* to apply the statute that defendants urge the Court to apply, since that is the very statute that the court of appeals selected in *Durante*.

Because *Durante* is not dispositive of the issue before me, I turn to the decisions of the other courts of appeals. At the outset, I note that the law in this area is unsettled. Only two circuit courts appear to have directly addressed the question, and they reached opposite conclusions. The Court of Appeals for the Third Circuit has held that a single statute of limitations should apply to all RICO claims brought in the third circuit. *Malley-*

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year statute of limitations, than to apply one to which the state legislatures have given no specific attention and which they swept up instead in a 'catch all.' " *Id.* at 340-41 (citations omitted). Judge Sloviter therefore concluded that all RICO claims should be measured by the four-year statute of limitations applicable to Clayton Act claims. *Id.* at 341.

Duff & Assocs., Inc. v. Crown Life Ins. Co., 792 F.2d 341, 349 (3d Cir.1986) ("[I]n borrowing state limitations periods for civil RICO claims courts must select, in each state, the *one* most appropriate statute of limitations for *all* civil RICO claims.") (emphasis in original). The Court of Appeals for the Sixth Circuit has taken a different view. Without engaging in as detailed an analysis as the Court of Appeals for the Third Circuit, it held that the selection of the appropriate statute of limitations for civil RICO claims must be made on a case-by-case examination of the underlying predicate acts. *Silverberg v. Thomson McKinnon Sec., Inc.*, 787 F.2d 1079, 1083 (6th Cir.1986) ("[T]he selection of the applicable state limitations period in the individual case should be made on the basis of a characterization of the kind of factual circumstances and legal theories presented.").

Two other courts of appeals would apparently follow the uniform approach. The Court of Appeals for the Eleventh Circuit has hinted in dictum that it too would apply a single state limitations period to all RICO claims. *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1014 n. 4 (11th Cir.1986) ("[T]he key lesson of *Wilson* seems to be that there should be applied 'in each State . . . the one most appropriate statute of limitations' for all RICO actions.") (citations omitted) (quoting *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985)). And, although it has not said so explicitly, the Court of Appeals for the Ninth Circuit would appear to have adopted the uniform approach to the selection of a statute of limitations for RICO actions. *See Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir.1984) ("We . . . find that the California period of limitation applicable to state claims most analogous *to RICO civil actions* is the three year period for actions based on statute.").

Although some of the remaining courts of appeals have been called upon to select a state statute of limitations for civil RICO claims, they did not do so in a manner that reveals which approach they were following, if indeed they even considered the question. *See, e.g., Alexander v. Perkin Elmer Corp.*, 729 F.2d 576, 577 (8th Cir.1984). The district court decisions in these circuits have reached conflicting conclusions, much like the circuit court decisions discussed above, although the more

recent district court opinions appear to adopt the uniform approach with greater frequency.[5]

Having studied the question carefully, I find that I am most persuaded by the Third Circuit's well-reasoned and scholarly opinion in *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir.1986). That court based its analysis on *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), in which the Supreme Court considered the borrowing process for claims under section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), and concluded that all such claims should be treated the same way for limitations purposes.

The court of appeals began its analysis by noting that *Wilson* established a three-part inquiry to guide the selection of the statute of limitations that will govern a federal claim. First, the court must consider whether state law or federal law governs the characterization of the claim for statute of limitations purposes. Next, the court must decide whether all claims arising under the federal law should be characterized in the same way, or whether they should be evaluated differently depending on the varying factual circumstances and legal theories presented in each individual case. Finally, the court must characterize the essence of the claim in the case before it, and determine which state statute provides the most appropriate limiting principle. 792 F.2d at 345 (citing *Wilson*, 105 S.Ct. at 1943).

The court of appeals then applied this three-step inquiry. First, it considered whether federal or state law governs the characterization of civil RICO claims for statute of limitations purposes. The court recognized that the characterization of RICO claims, like that of § 1983 claims, "is derived from the elements of the cause of action and Congress' purpose in providing it," and that "[t]hese, of course, are matters of federal

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5 *See, e.g., Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781 (E.D.La.1986); *Fink v. Meserve, Mumper & Hughes*, No. 84 Civ. 10382 (PHM) (N.D.Ill. June 19, 1986) [Available on WESTLAW, DCTU database]; *HMK Corp. v. John Walsey*, 637 F.Supp. 710 (E.D.Va.1986); *Ambrosino v. Rodman & Renshaw, Inc.*, 635 F.Supp. 968, 973-74 (N.D.Ill.1986); *Davis v. A.G. Edwards & Sons, Inc.*, 635 F.Supp. 707, 711 (W.D.La.1986); *Davis v. Smith*, 635 F.Supp. 459, 462 (N.D.Ill.1985).

law." *Wilson*, 105 S.Ct. at 1943. This being true, the confluence of the supremacy clause, U.S. Const. art. VI, cl. 2, and the Rules of Decision Act, ch. 646, 62 Stat. 944 (codified at 28 U.S.C. § 1652 (1982)), directs that the matter of characterization should be treated as a federal question. 792 F.2d at 346 (" 'If . . . federal law is both pertinent and valid, it applies because the supremacy clause of the Constitution so commands; if the federal law is impertinent or invalid, state law applies because Congress has so directed.' ") (quoting Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 Mich.L.Rev. 311, 316 (1980)). The court added that the "federal interest in uniformity and in having 'firmly defined, easily applied rules,' " which the Supreme Court emphasized in *Wilson*, applies with as much force to RICO as to other federal statutes, such as § 1983, § 301 of the Labor Management Relations Act, and the federal antitrust laws. 792 F.2d at 346.

After concluding that federal law controls the characterization of civil RICO claims for limitations purposes, the court turned to the second step in the *Wilson* inquiry—whether all claims arising under a particular federal law should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case. The court noted that in *Wilson*, the Supreme Court rejected the practice of parsing the particular allegations supporting an individual § 1983 claim, and instead looked to the federally-created cause of action for a broader analogy that could encompass all § 1983 claims brought in a given state.

The court of appeals outlined the considerations that led the Supreme Court in *Wilson* to select one limitation period for all § 1983 claims, and concluded that much of the Court's reasoning supported the same approach in the context of civil RICO claims. For example, the court of appeals observed that civil RICO is as far removed from any traditional state cause of action as is § 1983. It quoted those portions of the Second Circuit's opinion in *Durante* which made it clear that the RICO claim in that case differed significantly from a simple state law usury claim. The court opined that a similar analysis would apply to any RICO claim, since "concepts such as RICO 'enter-

prise' and 'pattern of racketeering activity' were simply unknown to common law, and all federal crimes contain jurisdictional and other elements irrelevant to any state civil action." 792 F.2d at 348. Thus, "as with § 1983, any analogies to traditional state causes of action 'are bound to be imperfect.' " 792 F.2d at 348 (quoting *Wilson*, 105 S.Ct. at 1945).

The court of appeals also noted that RICO presents the same danger identified in *Wilson* that two or more limitations periods could apply to one claim. Given the sheer number and variety of predicate acts that may constitute the pattern of racketeering activity in a given case, the particularized approach to borrowing statutes of limitations would " 'inevitably breed[ ] uncertainty and time-consuming litigation.' " 792 F.2d at 348 & n. 14 (quoting *Wilson*, 105 S.Ct. at 1945). The court observed:

> Even RICO claims based on "garden variety" business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods. A state may even have different limitations periods for common law fraud and securities fraud. More extreme cases might include allegations sounding in assault, battery, false imprisonment, infliction of emotional distress, abuse of process, or trespass to land or chattels.

792 F.2d at 348 (citations omitted). The fact that RICO requires at least two predicate acts in all cases makes it even more likely that more than one analogy will have force in a given case. Unless the two alleged predicate acts are closely related, it is unlikely that both acts would be subject to the same statute of limitations. 792 F.2d at 348 & n. 14. The court of appeals therefore concluded "that in borrowing state limitations periods for civil RICO claims courts must select, in each state, the *one* most appropriate statute of limitations for *all* civil RICO claims. 792 F.2d at 349 (emphasis in original).

The court then turned to the final stage in the three-step inquiry—the selection of the one state statute to govern all civil

RICO actions arising in Pennsylvania, the state in which *Malley-Duff* arose. The court quickly rejected the Clayton Act's four-year statute of limitations for private treble damage antitrust suits:

> [A]lthough RICO and the Clayton Act both require injury to business or property for standing to sue, there is little overlap between the types of *conduct* that are prohibited; and [,] despite the fact that Congress consciously drew upon the antitrust model in drafting RICO, it did not include a comparable statute of limitations period, perhaps indicating a congressional intent that there not be a national standard.

792 F.2d at 350 n. 17. The court proceeded to choose among four Pennsylvania statutes of limitation: (1) the statute governing common law fraud actions, (2) the statute governing civil penalty or forfeiture actions, (3) a "potpourri" two-year statute of limitations, and (4) the "catchall" six-year residual statute of limitations. The court considered each in turn. The court observed that " 'the common law fraud analogy falls far short of capturing the multitude of factual bases on which RICO can be based,' " 792 F.2d at 351 (quoting *Electronic Relays (India) Pvt. Ltd. v. Pascente*, 610 F.Supp. 648, 651 (N.D.Ill.1985)), and concluded that "characterizing RICO as essentially a fraud action would be to have the tail wag the dog," *id.* The court also rejected the analogy to actions for civil penalty or forfeiture, noting that civil RICO is not a forfeiture statute, since a successful private plaintiff's recovery is based upon the injury sustained rather than on what the defendant gained through illegal conduct. Nor did the court think that the treble damage provision was intended primarily as a penalty. In addition, the court was concerned that the one-year Pennsylvania limitation period applicable to civil penalty or forfeiture actions was so short that it might contravene the broad remedial purposes of civil RICO. The court also rejected 42 Pa.Cons.Stat.Ann. § 5524 (Purdon Supp.1986), which it described as "a two-year statute of limitations, covering a potpourri of civil actions." The court found that this choice suffered from the "fundamental" failing that it does not "characterize the federal cause of

actions" as *Wilson* commands, but instead "seeks to take advantage of the fortuitous circumstance that a number of potential state law analogies share a common limitations period." As the court observed, "[s]uch an approach will provide little guidance for the resolution of this problem in other states, and may prove particularly vulnerable to changes in the state statute of limitations scheme." 792 F.2d at 352.

Finally, the court of appeals turned to Pennsylvania's "residual 'catchall' statute of limitations for actions, primarily based on statute, that are not governed by any more specific period of limitations." The court recognized that the Supreme Court had considered and rejected the application of such a catchall statute to § 1983 claims in *Wilson*. Nonetheless, it found that the Supreme Court's reasons for rejecting this particular analogy in the § 1983 context did not apply to RICO:

> RICO was enacted in 1970, long after statutory causes of action and corresponding catchall limitations periods became commonplace. Thus, it would not be disingenuous (or anachronistic) to suggest that Congress might have approved of borrowing such statutes. Second, RICO is a strictly statutory remedy to enforce statutory rights.

792 F.2d at 352. In further support of its choice, the court of appeals noted:

> Such an approach . . . recognizes that civil RICO is truly *sui generis* and that particular claims cannot be readily analogized to causes of action known at common law—the very observation that led us to search for a uniform limitations period in the first place. And, like personal injury statutes, the catchall statutes are particularly unlikely to be fixed in manner that would discriminate against federal claims.

792 F.2d at 353. The court observed that the American Bar Association's Ad Hoc Task Force on Civil RICO had specifically approved of cases characterizing RICO in this way. 792 F.2d at 352-53 (quoting *A.B.A. Civil RICO Report*, *supra* p. 29, at 389-91). Interestingly, the court of appeals cited *Durante* as one of the cases applying a catchall statute to a RICO claim.

792 F.2d at 353. Accordingly, the court of appeals concluded that all civil RICO actions arising in Pennsylvania would be governed by Pennsylvania's six-year residual statute of limitations, 42 Pa.Cons.Stat.Ann. § 5527 (Purdon Supp.1986).

I agree with the Third Circuit's general analysis in *Malley-Duff*, and conclude that I should select "the one most appropriate statute of limitations for all civil RICO claims." *Accord Teltronics Servs., Inc. v. Anaconda-Ericsson, Inc.*, 587 F.Supp. 724, 733 (E.D.N.Y.1984) (finding § 214(2) uniformly applicable to all RICO claims in New York), *aff'd on other grounds*, 762 F.2d 185 (2d Cir.1985). Of course, I must still engage in the third stage of the *Wilson* inquiry to determine which *New York* statute is the most appropriate. There are three apparent candidates, including those suggested by the parties: (1) the six-year statute governing actions based upon fraud, N.Y.Civ.Prac.Law § 213(8) (McKinney Supp.1986); (2) the six-year "omnibus" statute governing actions "for which no limitation period is specifically prescribed by law," *id.* § 213(1); and (3) the three-year statute governing actions "to recover upon a liability, penalty or forfeiture created or imposed by statute," *id.* § 214(2). I consider each in turn.

I reject § 213(8), governing actions based upon fraud, for essentially the same reasons that the Third Circuit rejected the corresponding Pennsylvania statute. Although many civil RICO actions have alleged wire, mail, or securities fraud as predicate acts,[6] the statute defines "racketeering activity" to include nine state law felonies and violations of over 25 federal statutes, including those prohibiting bribery, counterfeiting, embezzlement of pension funds, gambling offenses, obstruction of justice, interstate transportation of stolen property, and labor crimes. " 'The common law fraud analogy falls far short

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6 This trend has been the subject of increasing disquietude over the federalization of state common law. *See Sedima*, 105 S.Ct. at 3293 (Marshall, J., dissenting); 131 Cong.Rec. S10285-88 (1985) (remarks of Sen. Hatch). Many current proposals to curtail civil RICO are directed to precisely this point. For example, Senate Bill 1521, 99th Cong., 1st Sess. (1985), would require at least one predicate act other than mail, wire, or securities fraud to make out a civil RICO claim.

Malley-Duff, 792 F.2d at 351. *See also* Boucher, *Bill Curbing RICO's Use Advances*, Nat'l L.J., Sept. 1, 1986, at 15, col 1.

of capturing the multitude of factual bases on which RICO can be based,' " *Malley-Duff*, 792 F.2d at 351 (quoting *Electronic Relays*, 610 F.Supp. at 651), and to characterize RICO "as essentially a fraud action would be to have the tail wag the dog," *id.* I also find inapplicable § 213(1), the "omnibus" statute governing actions "for which no limitation period is specifically prescribed by law." Our court of appeals has observed that § 213(1) "has generally been understood to govern only actions for equitable relief." *Pauk v. Board of Trustees*, 654 F.2d 856, 863 (2d Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982) (citing *Singleton v. City of N.Y.*, 632 F.2d 185, 190 (2d Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981)).

On the other hand, I find that § 214(2) provides a compelling analogy to civil RICO claims. Section 214(2) encompasses actions based upon a "liability . . . created or imposed by statute." As New York's highest court has explained, § 214(2) is "applicable to actions for wrongs not recognized in the common or decisional law." *State v. Cortelle Corp.*, 38 N.Y.2d 83, 86, 341 N.E.2d 223, 224, 378 N.Y.S.2d 654, 656 (1975). Section 214(2) was applied to § 1983 claims in this circuit before the Supreme Court decided in *Wilson* that § 1983 claims must be analogized to personal injury actions, *see Pauk v. Board of Trustees*, 654 F.2d 856, 866 (2d Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982), and its predecessor was applied to private treble damage antitrust actions before the Clayton Act was amended to include a four-year statute of limitations, *see, e.g., Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 82 (2d Cir.) (Friendly, J.), *cert. denied*, 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed.2d 26 (1961). Moreover, § 214(2) is the statute that our court of appeals chose to apply to the civil RICO claim in *Durante*. It would therefore seem particularly appropriate to analogize civil RICO actions to actions based upon a statutory liability, and to measure their timeliness with § 214(2).[7]

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7 My decision to apply § 214(2) may, at first blush, seem inconsistent with *Malley-Duff*, in which the Third Circuit rejected a somewhat similar

Accrual of Civil RICO Claims

Having concluded that civil RICO claims arising in New York are governed by a three-year statute of limitations, I must now determine the point at which such a claim accrues. Although state law specifies the duration of the limitations period, and the circumstances under which the period is tolled, *see, e.g., Wilson*, 105 S.Ct. at 1943 & n. 17, federal law determines the date on which the period begins to run. *Bowling v. Founders Title Co.*, 773 F.2d 1175, 1178 (11th Cir.1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1516, 89 L.Ed.2d 915 (1986) (citing *Rawlings v. Ray*, 312 U.S. 96, 98, 61 S.Ct. 473, 474, 85 L.Ed. 605 (1941)); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir.1984); *Singleton v. City of N.Y.*, 632 F.2d 185, 191 (2d Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981). Under the general federal rule, the statute of limitations begins to run when a plaintiff knows or has reason to know of the injury that is the basis for his action. *Bowling*, 773 F.2d at 1178; *Compton*, 732 F.2d at 1433; *Singleton*, 632 F.2d at 191.

Although the general rule is adequate for most federal causes of action, it presents two problems when applied to a civil RICO claim. First, a plaintiff may be injured before he has the right to sue under RICO. To bring a civil RICO claim, a private

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Pennsylvania statute of limitations. However, the Pennsylvania statute dealt only with statutory actions "for civil *penalty or forfeiture*," and the court of appeals found it inapplicable because it concluded that RICO was neither a forfeiture statute nor primarily a penalty statute. Unlike the Pennsylvania statute, § 214(2) explicitly encompasses actions based "upon a liability . . . created or imposed by statute." In addition, the court of appeals was concerned that the Pennsylvania statute, which provides a one-year limitations period, might be so short that it would contravene the broad remedial purposes of civil RICO. Section 214(2), on the other hand, provides a three-year limitations period, and would seem to strike an appropriate balance between the broad remedial purposes of RICO and the policies of repose. *Cf. Electronic Relays*, 610 F.Supp. at 653. ("Two years is certainly long enough to realize one has been injured by a RICO violation and and to bring suit. And the normal rules on accrual and tolling should ensure that no diligent RICO plaintiff will find his claim time-barred.") The Third Circuit's concerns are therefore not relevant here.

plaintiff must be injured "by reason of a violation of" one or more of the criminal provisions of RICO. 18 U.S.C. § 1964(c) (1982). Most such violations entail the commission of a "pattern of racketeering activity," *id.* § 1962, which, as defined by the statute, "requires at least two acts of racketeering activity," *id.* § 1961(5). There is no longer any doubt that the injury contemplated by § 1964(c) is nothing more than an injury from an act of racketeering activity. *Sedima*, 105 S.Ct. at 3285-86. Thus, if the first act of racketeering activity injures the plaintiff, the general federal accrual rule would start the statute of limitations running before the commission of the second predicate act. Yet, until the defendant commits the second act of racketeering activity, there can be no "pattern," there has been no violation of § 1962, and the plaintiff has no right to bring a civil RICO action.

Second, unlike most federal claims, which involve a single injury, a civil RICO claim will often involve multiple injuries.[8] By its very language, the RICO statute contemplates the commission of multiple acts by the defendant. Where the plaintiff is the victim of more than one of these acts, he may well suffer multiple injuries.

In the case of most federal causes of action, when a plaintiff suffers two injuries as a result of a defendant's conduct, each injury gives rise to a separate claim; the applicable limitation period runs separately on each claim from the time that the plaintiff knew or had reason to know of the corresponding injury. *See, e.g., Singleton*, 632 F.2d at 190-93 & n. 5 (§ 1983).

Courts have recognized an exception to this rule for certain practices which by their very nature involve an element of conti-

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8 Of course, the general federal rule may suffice for the garden variety RICO claim that arises out of a single fraudulent scheme involving, for example, a violation of the federal securities laws and multiple acts of mail and/or wire fraud, because in such a case the plaintiff usually suffers only a single injury. At least two courts of appeals have applied the general federal rule to civil RICO claims. *Bowling v. Founders Title Co.*, 773 F.2d 1175, 1178 (11th Cir.1985); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir.1984). The Eighth Circuit has also applied this standard to a civil RICO action. *Alexander v. Perkin Elmer Corp.*, 729 F.2d 576, 577 (8th Cir.1984). The court appears, however, to have been applying state law, which coincidentally specifies an identical accrual rule.

nuity. Under this exception, an action is timely as long as the last act evidencing the continuing practice falls within the limitation period, and courts will grant relief with respect to earlier related acts that would otherwise be time-barred. The "continuing violation" doctrine in employment discrimination cases provides a good example of this exception. *See, e.g., Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir.1982) (suit timely where pattern of discriminatory acts continues into the limitation period, even though discriminatory acts commenced prior to limitation period); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105-06 (2d Cir.1978); *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir.1978); *see generally* B. Schlei & P. Grossman, *Employment Discrimination Law* 1042-54 (2d ed. 1983).

RICO would seem an appropriate context in which to invoke this exception. By its terms RICO requires some degree of continuity. As noted above, a plaintiff cannot sue until the defendant has committed at least two predicate acts, and therefore in all likelihood caused two injuries. The Supreme Court suggested in *Sedima* that a RICO pattern requires not only two predicate acts, but also the "factor of *continuity plus relationship.*" *Sedima*, 105 S.Ct. at 3285 n. 14 (emphasis in original). Indeed, RICO's criminal provisions have been construed to create a continuing offense:[9]

> The Act provides an example of a continuing offense for purposes of computing the time at which the statute of limitations begins to run. The "nature of the crime . . . is such that Congress must assuredly have intended that it be treated as a continuing one." The language of the Act, which makes a pattern of conduct the essence of the crime, "clearly contemplates a prolonged course of conduct."

United States v. Field, 432 F.Supp. 55, 59 (S.D.N.Y.1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. denied*, 439 U.S. 801,

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9 The timeliness of a prosecution for a violation of the criminal provisions of RICO is measured by the five-year federal statute of limitations for non-capital offenses, 18 U.S.C. § 3282 (1982). Such a prosecution is timely if at least one act of racketeering is alleged to have occurred in the preceding five years. *United States v. Persico*, 621 F.Supp. 842, 872-73 (S.D.N.Y.1985).

99 S.Ct. 43, 58 L.Ed.2d 94 (1978) (quoting *Toussie v. United States*, 397 U.S. 112, 115, 120, 90 S.Ct. 858, 860, 863, 25 L.Ed.2d 156 (1970)) (citations omitted). I therefore conclude that the statute of limitations governing a civil RICO claim begins to run when the plaintiff knows or has reason to know of the injury from the last predicate act on which he relies.[10]

The Timeliness of Bankers' RICO Claim

Turning now to the facts of this case, I must determine whether Bankers' RICO claim is timely under the above standards. Bankers maintains that its RICO claim is timely even when measured by a three-year statute of limitations. Bankers reasons that the timeliness of its claims must be measured from the last predicate act, which it claims is the 1982 bankruptcy fraud.

Not surprisingly, Soifer contends that Bankers' claim against him is time-barred under a three-year statute of limitations. He maintains that the last predicate act with which he is charged is the concealment of the Brookfield asset in connection with the initial bankruptcy fraud. He asserts that this act was committed no later than March 1976, and that Bankers learned of the resulting injury no later than September 1976, when it commenced a proceeding in the bankruptcy court to set aside the confirmation of BAC's plan.

I agree that Bankers' claim against Soifer is time-barred to the extent that it is based upon his having violated the substantive proscriptions of RICO; however, I conclude that Bankers' claim is timely to the extent that it is based upon Soifer's having conspired to violate RICO. Although, as Bankers points out, the 1982 bankruptcy fraud is the most recent predicate act alleged, as noted above, the complaint contains no allegation that Soifer played any role in that transaction. Nor is Soifer alleged to have played any part in the frivolous lawsuits or the bribery of Judge Ballenger.

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10 Of course, if the defendant can show at trial that the predicate acts alleged constituted more than one pattern, he will not be liable for the injuries from the predicate acts comprising those patterns that did not continue into the limitations period.

Thus, the 1976 bankruptcy frauds are the most recent predicate acts in which Soifer is alleged to have participated. The commission of predicate acts by other participants in the enterprise cannot save Bankers' claims against Soifer for *substantive* violations of RICO. Only Soifer's own acts can have that effect. I therefore conclude that as to Bankers' claim that Soifer violated the substantive provisions of RICO, the three-year statute of limitations began to run in September 1976, when Bankers discovered the first bankruptcy fraud and commenced a proceeding to set aside the confirmation of BAC's plan.[11] Since this action was commenced some six years later, those allegations are barred by the statute of limitations and must be dismissed as against Soifer. Bankers may replead its substantive RICO claim within thirty days if it can allege with greater specificity Soifer's role in the post-1976 predicate acts.

Although the fact that Soifer's co-defendants committed predicate acts within the limitations period does not render Bankers' substantive RICO claims timely as to Soifer, the same is not true with respect to Bankers' claim that Soifer conspired to violate RICO. In the case of a continuing civil conspiracy, each time a member of the conspiracy commits an overt act in furtherance of the conspiracy, a cause of action accrues to the plaintiff to recover the damages caused by that act, and as to those damages the statute of limitations runs from the commission of the act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971)

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11 Bankers' reliance on 18 U.S.C. § 3284 (1982) does not save its civil RICO claim against Soifer. Section 3284 makes fraudulent concealment a continuing crime that is not deemed complete, and for which the limitations period does not begin to run, until the debtor either receives a final discharge or is denied a discharge. Section 3284 is a criminal tolling provision, and is inapplicable to civil claims. It acts only to toll the five-year criminal statute measuring the timeliness of a prosecution for the underlying predicate act. Thus, theoretically, Soifer can still be prosecuted for his part in the initial bankruptcy fraud.

However, § 3284 has no effect on the running of the statute of limitations for a civil RICO claim alleging fraudulent concealment as a predicate act. Just as the fact that a predicate act is time-barred does not bar a civil RICO claim, so too the fact that a predicate act is not time-barred does not render a civil RICO claim timely.

(continuing antitrust conspiracy). Because Bankers has alleged that Soifer conspired with Braten and Rhoades to violate RICO, and that Braten and Rhoades committed predicate acts within the limitations period, Bankers' conspiracy claim is timely even as to Soifer. Of course, at trial Soifer may still attempt to prove that he withdrew from the conspiracy prior to the commission of the 1982 bankruptcy fraud, or that his co-conspirators' actions were either not in furtherance of or not a natural and probable consequence of the conspiracy. Accordingly, Soifer's motion for judgment on the pleadings is denied as to Bankers' claim that Soifer conspired to violate RICO.

The remaining defendants, other than Feldesman and Brookfield Clothes, *see supra* note 1, have also moved for judgment on the pleadings on statute of limitations grounds. There is no question that Bankers' claims against the remaining defendants were asserted timely, since each of these defendants is alleged to have played a part in the 1982 bankruptcy fraud, well within the three-year limitations period. Accordingly, their motions are denied.

Conclusion

For the foregoing reasons, I conclude that Bankers does not lack standing to assert its RICO claim. I also conclude that Bankers has adequately alleged the commission of a pattern of racketeering activity on the part of Soifer, Braten, and Rhoades, but not on the part of the various corporate defendants. Finally, I conclude that Bankers' claim that Soifer violated the substantive provisions of RICO is barred by the applicable statute of limitations, while its claim that Soifer conspired to violate RICO was brought timely. Bankers claim against Braten and Rhoades was also brought timely.

Accordingly, Braten and Rhoades' motion for judgment on the pleadings is denied in all respects. The corporate defendants' motion is granted and the complaint is dismissed as to Brookfield Industries, Inc., Bennington Court Ltd., Braxton Ltd., Aura by Laurie, Ltd., Erwin Commercial Corp., Michael B. Marks, Inc., Timely Textiles, Inc., and Todd Equipment Leasing Co., Inc. Bankers may replead within thirty days if it

can allege with more specificity that any of the corporate defendants actively engaged in two or more predicate acts of racketeering activity. If Bankers chooses to replead, it should separately number and state its allegations as to each corporate defendant, rather than lumping them together and referring to them collectively as "the defendants." Soifer's motion is granted with respect to Bankers' claim that he violated the substantive provisions of RICO and denied in all other respects.

SO ORDERED.

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Part I—Crimes

Chapter 96—Racketeer Influenced and Corrupt Organizations

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information) section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 relating to interstate transportation of stolen motor vehicles), sections

2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of

gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged

in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(a)(1) any interest the person has acquired or maintained in violation of section 1962;

(a)(2) any—

(a)(2)(A) interest in;

(a)(2)(B) security of;

(a)(2)(C) claim against; or

(a)(2)(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(a)(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(b)(1) real property, including things growing on, affixed to, and found in land; and

(b)(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without

cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(d)(1)(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(d)(1)(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(d)(1)(B)(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(d)(1)(B)(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(d)(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfei-

ture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(d)(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible

to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(g)(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(g)(2) compromise claims arising under this section;

(g)(3) award compensation to persons providing information resulting in a forfeiture under this section;

(g)(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(g)(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(h)(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(h)(2) granting petitions for remission or mitigation of forfeiture;

(h)(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(h)(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(h)(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition, and

(h)(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(i)(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(i)(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(l)(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(l)(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right,

title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(l)(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(l)(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(l)(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(l)(6)(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(l)(6)(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(l)(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to

property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee. (n)[1] If any of the property described in subsection (a), as a result of any act of omission of the defendant—

(n)(1) cannot be located upon the exercise of due diligence;

(n)(2) has been transferred or sold to, or deposited with, a third party;

(n)(3) has been placed beyond the jurisdiction of the court;

(n)(4) has been substantially diminished in value; or

(n)(5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover

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1 So in original.

threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

No. 88-1337
No. 88-1351

Supreme Court, U.S.
FILED
MAR 10 1989
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

DANIEL RHOADES and MILTON BRATEN,

Petitioners,

—v.—

BANKERS TRUST COMPANY, *et ano.*,

Respondents.

BRIEF OF RESPONDENT BANKERS TRUST COMPANY IN OPPOSITION TO PETITIONS OF HERMAN SOIFER, DANIEL RHOADES AND MILTON BRATEN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID RABINOWITZ
(*Counsel of Record*)
DAVID B. PICKER
MOSES & SINGER
1271 Avenue of the Americas
New York, New York 10020
(212) 246-3700
Attorneys for Respondent Bankers Trust Company

3700

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err, so as to require review by this Court, in holding that Respondent-plaintiff had standing to assert a civil claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), where Respondent was injured in its business and property by the conduct constituting the violation, including repeated acts of bankruptcy fraud preventing plaintiff from recovering its debt from a bankrupt corporation and depriving plaintiff of its bankruptcy law remedies and bribery of a state court judge in state court proceedings involving the plaintiff?

2. Did the Court of Appeals err, so as to require review by this Court, in holding that a bankrupt corporation, forming part of a RICO enterprise and which is under the continuing control of the individual RICO defendants, is not the only party with standing to bring a RICO claim against the defendants, where the RICO pattern includes—but does not consist solely of—the looting of the corporation's assets by those defendants, and where no other creditor of the corporation has sought any relief based upon those offenses, no trustee in bankruptcy for the corporation has been appointed, and any trustee that could be appointed might not have a claim and also might be barred from obtaining relief by the statute of limitations?

3. Did the Court of Appeals err, so as to require review by this Court, in applying the rule of separate accrual to govern the period of limitations applicable to RICO claims, and holding that the period does not begin to run until the damages recoverable, if any, are determined by resolution of bankruptcy proceedings that bear on such injury, and in directing the dismissal without prejudice of a creditor's RICO action on the ground that the claim had not yet accrued?

PARTIES TO THE PROCEEDINGS

Respondent Bankers Trust Company is the plaintiff in this lawsuit and was the appellant in the Court below. Petitioners Herman Soifer, Daniel Rhoades and Milton Braten are the defendants in this lawsuit and were the appellees in the Court below.

Bankers Trust Company is a subsidiary of Bankers Trust New York Corporation. The following is a list of Bankers Trust Company's affiliates and subsidiaries:

Subsidiaries of Bankers Trust New York Corporation

Bankers Trust Company
Bankers Trust Company of California, N.A.
Bankers Trust Company of Florida, N.A.
Bankers Trust (Delaware)
  BTC Corporation
BT Advisors, Inc.
BT Brokerage Corporation
BT Investment Managers, Inc.
  Sumigin Bankers Investment Management Co. Ltd.
BT Leasing Corp.
BT Leasing Services, Inc.
  BT Commercial Corporation
Coleman Factors Corporation
BT (Pacific) Ltd.
  BIC Trade
    Iochpe Trade S.A. Comercio Internacional
  BIC Brazil
    Sernic S.A. Comercio e Servicos
    Banco Iochpe S.A.
    Banco Iochpe de Inveštimento S.A.
      Iochpe Arrandamento Mercantil S.A.
      Iochpe S.A. Corretora de Valores Mobiliarios
      Iochpe S.A. Credito Financiamento e Investimento
      Iochpe S.A. Distribuidora de Valores Mobiliarios
      Figorifico Ideal
  BT Holdings (South America) Ltd.

BT Holdings (South America) Ltd y Compania Ltda.
IM Trust
Brett Investments Ltd.
Brett (Chile) S.A.
BT (Pacific) Ltd. y Compania Ltda.
Compania de Seguros de Vida Consorcio Nacional de Seguros S.A.
Administradora de Fondos de Pensiones Provida S.A.
Inversiones Santiago
Sahathunpaibul Co., Ltd.
BT Southwest, Inc.
BT Southwest Trust Company
BT Capital Corporation
ADS Associates, Inc.
BT Futures Corp.
BT Futures (Singapore) Ltd.
BT Holdings (Asia) Ltd.
BT Brokerage (Asia) Limited
BT Brokerage (H.K.) Limited
BT Futures (H.K.) Limited
BT Equities (H.K.) Limited
BT Brokerage Nominees Limited
BT Investments (New Zealand) Ltd.
BT New Zealand (Holdings) Ltd.
BT New Zealand Ltd.
Bankers Trust Pacific Ltd.
BT Financial Corporation (NZ) Ltd.
BT New Zealand (HK) Ltd.
Valuta Investments Ltd.
BT Brokerage and Associates Ltd.
Ruamthunpaibul Co., Ltd.
PT Bankers Trust Lippo Leasing
BT Overseas Finance (Delaware), Inc.
Bankers Trust Overseas Finance N.V.
Bankers Trust International Capital N.V.
BT International Trading Corporation
BT Private Clients Corp.
BT Securities Corporation
Lourmel Investors (Delaware), Inc.

Private Clients Group, Inc.
BT Partners, Inc.
BT Realty Resources, Inc. (formerly Sackman-Gilliland Corporation)
Dedham Property Associates, Inc.
Investors Real Estate Corp.
Marlboro Hotel Corp.
Peabody Hotel Corp.
BT Gold (sold in 1988)
BT Financial Services Information Systems Corporation
Pyramid Ventures Inc.
BT Financial of California, Inc.
BT Northeast
RAM International
Equator Holdings Inc.
World Trading Inc. (Delaware)
World Trading Inc. (Cayman Islands)
Capricorn Holdings Inc.
Capricorn Holdings Limitado
Solciedad Quimica y Minera de Chile S.A.

Subsidiaries of Bankers Trust Company

BT Aeron, Inc.
BT Baltimore, Inc.
BT Bancshares, Inc.
Bankers Trust Company of Albany, N.A.
BT Barges, Inc.
BT Philmor, Inc.
BT Ventures, Inc.
BT Green, Inc.
BT Ever, Inc.
BT Harborside Urban Renewal Corporation
Kingsmead New York Investors, Inc. (*sold in 1988*)
200 Greenwich Investors, Inc. (*sold in 1988*)
B.T.N.Y. Services, Inc.
BT Straits, Inc.
Bankers Company, Inc.
Bankers Trust Nominees, Ltd.
Japan Bankers Trust Company, Ltd.

Bankers Trust International
BT Bank of Canada
BT Potomac, Inc.
BT Pyramid Corp.
  BT Cargo, Inc. (*sold in 1988*)
  BT Despatch, Inc. (*sold in 1988*)
  BT Equipment Leasing, Inc.
    Realprop Investors Pacific, Inc.
  BT Expedition, Inc.
Grobar & Company
625 Investors, Inc.
BT Parcel, Inc.
BT Florida, Inc.
Pyramide Nominee Limited
  Bankers Trust Nominees Limited
BT Sing, Inc.
BT Siang-Tse, Inc.
Trybaco Holding Corp.
Bankers Company of New York
  Bankers Trustee Company, Ltd.
    Credit and International Trust N.V.
Sablons Investors, Inc.
Pep II Investors, Inc.
Bankers Trust Luxembourg
Bankers International Corporation
  Private Export Funding Corp.
  Petroquimica del Atlantico S.A.
  Bankers Trust Finanziaria S.p.A.*
  B.T. Rio de la Plata, S.A.
  B.T. International (Nigeria) Ltd.
  B.T. Overseas Representatives, Inc.
  Bankers Trust (Brasil) Services Ltd.*
  BT Virgin Islands, Inc.
  Bankers Trust Holdings (Europe) Ltd.
    BT Pension Fund Trustees Ltd.
    Bankers Trust Holdings (UK) Ltd.

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* Subsidiaries are listed with parent holding the largest interest in the entity.

Pyramid Holdings PLC
The World Markets Company PLC
Pyramid Office Properties Ltd.
Pyramid (UK) Ltd.
BT GoldNotes Limited
Bankers Trust International Ltd.
BT Gilts Ltd.
BT Gilts Nominees Ltd.
BT Sterling Securities Ltd.
SNC Bankers Trust Holdings (Europe)*
BT Finance et Marches S.A.
Bankers Trust (France) S.A.
BTI Investments Ltd.
BT Servicios Financieros S.A.
Lognee Holdings Ltd.
Ezando Ltd.
New Broad Street Properties Ltd.
Shipton Automation Ltd.
Rodo Nominees
Bankers Trustee Company Ltd.
Rodocanachi Leasing Ltd.
Turk Merchant Bank A.S.
B.T. International (Delaware), Inc.
B.T. International (Nigeria) Ltd.
BT Asia (Hong Kong) Limited
BT Foreign Investment Corp.
Bankers Trust International Services Ltd.
Bankers Trust Management Co., Ltd.
BT Asia (Securities) Limited
BT Nominees (H.K.) Ltd.
BT Asia Securities (H.KI.)
BT Asia Securities (Tokyo)
BT Finance Ltd.
Bankers Trust AG
B.T. (Cayman) International Ltd.
BTSA Panama
B.T. Asia Limited

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* Subsidiaries are listed with-parent holding the largest interest in the entity.

BT Nominees (H.K.) Ltd.
BT Finance Ltd.
Bankers Trust Gmbh
Deutsche Union Finanzberatungs Gmbh
BT Trustees (Jersey) Ltd.
Globnet
BT Investments (Australia) Limited
Bankers Trust Australia Limited
BT Australia (H.K.) Financial Services Ltd.
BT Australia Limited
BT Australia (H.K.) Limited
BT Australia (U.K.) Limited
BT Finance International Limited
BT Pacific Management Limited
Grenville Finance Limited
Abton Pty. Limited
Bavian Pty. Limited
Bittoorong Pty. Limited
Bond Investments (Singapore) P/L
BT Asset Management Limited
BT Consultants Pty. Limited
BT Custodians Limited
BT Finance Pty. Limited
BT Financial Services Limited
BT Lease Packaging Pty. Limited
BT Leasing (No. 1) Pty. Limited
BT Nominees Pty. Limited
BT Securities Limited
Share Australia Management Company Ltd.
BT Structured Finance Pty. Limited
Quexton Pty. Limited
BT (Queensland) Pty. Limited
Cazinon Pty. Limited
Cebary Pty. Limited
Cedant Pty. Limited
Cederno Pty. Limited
Cedfield Pty. Limited
Cefford Pty. Limited
Cefington Pty. Limited

Cemasta Pty. Limited
Cenford Pty. Limited
Colebrook Securities Pty. Limited
Deccand Pty. Limited
Deline Pty. Limited
Lysona Pty. Limited
Orelino Pty. Limited
Pendal Nominees Pty. Limited
Rugarno Pty. Limited
Sabt Investments (Singapore) Pty. Limited
Sanlucar Pty. Limited
Tadina Pty. Limited
Talamba Pty. Limited
Tegny Pty. Limited
Tenata Pty. Limited
Vanne Pty. Limited
Abadee Pty. Limited
Altamira Pty. Limited
Austraclear Limited
BT Finance & Investment Pty. Limited
BT Leasing (No. 2) Pty. Limited
BT Leasing (No. 3) Pty. Limited
BT Stockbrocking Pty. Limited
Button Wood Nominees Pty. Limited
Citic Nominees Pty. Limited
Clopa Pty. Limited
Dintene Pty. Limited
Girlindee Pty. Limited
Hevenly Pty. Limited
Lasid Pty. Limited
Mason Street Holdings (No. 2) P/L
Micabank Pty. Limited
Mimlor Pty. Limited
Nabaro Pty. Limited
Nanway Nominees Pty. Limited
Neray Limited
Partin Pty. Limited
Portland Investments A Pty. Limited
Portland Investments B Pty. Limited

Portland Investments C Pty. Limited
Potona Pty. Limited
Respus Pty. Limited
Rovenda Pty. Limited
Rovny Pty. Limited
Roydar Pty. Limited
Rulan Pty. Limited
Runala Pty. Limited
Sabt Pty. Limited
Sadoy Pty. Limited
Sodaine Pty. Limited
Technology Investment Management Fund
Varzy Pty. Limited
Wuxta Pty. Limited
Zatika Pty. Limited

Bankers Trust International (Asia) Ltd.
Thai Investment & Securities Co. Ltd.
Malta Properties Ltd.
Anscor Capital & Investment Corp.
Tun Thamrong Company Ltd.
National Investment Trust Company Ltd.

Other Real Estate Subsidiaries of Bankers Trust Company

Anvers Investors, Inc.
Bercy Investors, Inc.
Duroc Investors, Inc.
Ero Properties, Inc.
Ero Properties Pacific, Inc.
Great Lakes Realty Corp.
Jasmin Investors, Inc.
Lessprop Investors, Inc.
Louremel Investors, Inc.
Melba Investors Atlantic, Inc.
Melba Investors Southeast, Inc.
Pelleport Investors, Inc.
Protean Investors, Inc.
Reo Resources, Inc.
Reo Resources Atlantic, Inc.
Sablons Investors, Inc.

Sarel Investors Atlantic, Inc.
Sarel Investors Pacific, Inc.
Sarel Investors Florida, Inc.
Pyramid Energy, Inc. (formerly Scandrill, Inc.)
Varrene Investors, Inc.
Vikell Investors, Inc.
Vikell Investors Pacific, Inc.
Wagram Investors, Inc.

Investments Controlled as a Result of Debts Previously Contracted

General Exploration Company
South Texas Drilling & Exploration

Investment Controlled as a Result of a Fiduciary Relationship

Infinity Broadcasting
Medical Care International

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1337

HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

No. 88-1351

DANIEL RHOADES and MILTON BRATEN,

Petitioners,

—v.—

BANKERS TRUST COMPANY, *et ano.*,

Respondents.

BRIEF OF RESPONDENT BANKERS TRUST COMPANY IN OPPOSITION TO PETITIONS OF HERMAN SOIFER, DANIEL RHOADES AND MILTON BRATEN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Bankers Trust Company ("Bankers") respectfully prays that the separate petitions, of Herman Soifer, and of Daniel Rhoades and Milton Braten,[1] for a Writ of Certiorari to

1 The Petition of Rhoades and Braten simply adopts by reference the arguments made in the Petition of Soifer.

issue to the United States Court of Appeals for the Second Circuit, be denied.

COUNTER-STATEMENT OF THE CASE[2]

Because Petitioners do not set forth the full nature and substance of Bankers' claims herein, Barkers respectfully submits this Counter-Statement of the Case, so that the issues can be seen in their proper context.

1. The Bankruptcy Frauds—1974-1977

Petitioners own, direct and control Braten Apparel Corporation ("BAC"). *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1098 (2d Cir. 1988); App. 3a. As of August 1974, BAC owed Bankers more than $4 million. In that month, at a time when BAC had recently sustained severe financial losses, it acquired all the stock of Brookfield Clothes, Inc. ("Brookfield Clothes"), which then had a net value of more than $3 million. In order to eliminate the indebtedness owed to Bankers and at the same time retain control over the assets of BAC (including, particularly, Brookfield Clothes), Petitioners Braten and Soifer (later joined by Petitioner Rhoades) embarked upon a scheme to conceal assets and obtain a fraudulent discharge in bankruptcy.

Braten and Soifer secretly agreed that Soifer would assume the apparent ownership of Brookfield Clothes and that BAC would file and prosecute a petition under Chapter XI of the Bankruptcy Act. It was agreed that Soifer would return Brookfield Clothes to BAC once BAC's bankruptcy discharge was obtained.

To effectuate this scheme, a sham "agreement" was executed among BAC, Braten and Soifer, which made it appear that

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2 References hereinafter to "App. _____" are to pages in Petitioners' joint Appendix.

BAC had lost its ownership of Brookfield Clothes to Soifer because it failed to make a certain loan. Misrepresentations respecting the ownership of Brookfield Clothes were made throughout BAC's Chapter XI proceeding, including, *inter alia*, the filing by BAC and its officers of a fraudulent Chapter XI petition (sworn to by Braten), Braten's false testimony in Bankruptcy Court, false financial statements of BAC distributed to BAC's creditors, false pleadings prepared by Petitioner Rhoades (counsel to BAC and to Braten) verified by him and by Braten, an "amendment" to BAC's Chapter XI schedules filed on the eve of the confirmation of BAC's proposed arrangement, and Rhoades' false testimony in Bankruptcy Court, as well as false out-of-court statements made to Bankers and other BAC creditors by the attorney for Soifer and Braten.

By these misrepresentations, Bankers was induced to accept a Chapter XI plan of arrangement proposed by BAC; in March 1976, BAC obtained the Bankruptcy Court's confirmation of the arrangement, which had the effect of relieving it of more than $4.3 million in debt.

A few months thereafter, the second phase of Petitioner's scheme was effected, by a complicated sequence of stock and asset transfers. Soifer gave Brookfield Clothes back to BAC, and publicly acknowledged that BAC had owned it all along (even during the period BAC was in Chapter XI). Soifer acquired from Braten half of the stock of Brookfield Industries, Inc. ("Brookfield Industries"), to which a substantial portion of the assets of Brookfield Clothes was conveyed. Soifer also purchased 45% of the stock of BAC from Braten; and Soifer's note, which he had given to Braten, was assigned by Braten to Rhoades.

Shortly after Soifer publicly acknowledged BAC's ownership of Brookfield Clothes, Bankers commenced a proceeding to revoke the confirmation of BAC's arrangement on the grounds that it had been procured by fraud. That proceeding resulted in revocation of the 1976 confirmation order, by decision and

order, after trial, of the Bankruptcy Court issued June 25, 1982.[3]

2. The Bribery

During this period, Rhoades, as counsel for BAC, Braten, Soifer and other of their affiliates, instituted a series of frivolous lawsuits in New York against Bankers in order to injure Bankers and hinder and delay Bankers' collection of its debt from BAC.[4]

Starting in July 1977, BAC and its affiliates commenced further actions against Bankers, this time in South Carolina, based on claims similar to those made in the New York actions and again seeking hundreds of million of dollars in damages. Rhoades was counsel to one of the South Carolina law firms representing BAC and its affiliates.[5] At the same time, another action was pending in South Carolina state court wherein Braten, represented by the same law firm, asserted claims to funds in an escrow account derived from the sale of machinery in which Bankers had a security interest.

In late 1978 and early 1979, both of these cases were pending before state court Judge William H. Ballenger. Rhoades, using a South Carolina corporation formed by him and beneficially

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3 All of the foregoing facts, and other details of defendants' 1974–1977 bankruptcy frauds, were adjudicated, and are described in detail, in *In re Braten Apparel Corporation*, 21 B.R. 239 (Bankr. S.D.N.Y. 1982), *aff'd*, 26 B.R. 1009 (S.D.N.Y.), *aff'd*, 742 F.2d 1435 (2d Cir. 1983).

4 Those actions, which alleged that Bankers had breached an agreement to extend additional credit to BAC and sought millions of dollars in damages, were summarily dismissed. Some of these actions, before their dismissal, were discussed in *Bankers Trust Company v. Braten, et al.*, 101 Misc.2d 227, 420 N.Y.S.2d 584 (Sup. Ct. N.Y. Co. 1979).

5 The first South Carolina action was brought by BAC (a New York Corporation) together with other non-New York corporations controlled by Rhoades for the benefit of Braten and Soifer. After Bankers removed that action to federal court, BAC discontinued it. Then, substantially the same action was brought in South Carolina state court by BAC alone, so that Bankers could not remove it to federal court.

owned by Braten and Soifer, and intending to influence Judge Ballenger, acquired a mortgage owing to a local bank by a corporation of which Judge Ballenger was a principal, and on which Judge Ballenger was personally liable to the extent of $100,000. Judge Ballenger was thereby induced to render decisions favorable to BAC and Braten, as follows: namely (1) in the escrow action, Judge Ballenger appointed a "special referee" who was a former partner of the South Carolina lawyer to whose firm Rhoades was counsel; and (2) Judge Ballenger denied Bankers' motion to dismiss BAC's multi-million dollar damage action. Bankers expended over $100,000 in legal fees in those cases. After the transactions involving Judge Ballenger, Petitioners and their entities came to light, Judge Ballenger recused himself from the escrow action, citing a "possible conflict of interest," the "special referee" resigned, and Judge Ballenger's denial of Bankers' motion to dismiss the damage action was reversed by the South Carolina Supreme Court as an abuse of discretion.[6]

3. The Subsequent Bankruptcy Frauds

In its June 25, 1982 decision revoking BAC's fraudulently procured confirmation, the Bankruptcy Court stated that BAC should offer to its creditors a new and "realistic" plan "in light of the fact that the debtor owns a valuable asset—Brookfield." *In re Braten Apparel Corp.*, 21 B.R. at 263. The Bankruptcy Court, however, had been deceived by Petitioners again. After the revocation trial had concluded, but before the decision was rendered, Petitioners had embarked on a new fraudulent scheme, designed once again to subvert the bankruptcy laws, shield BAC's assets from Bankers, and frustrate the coming adverse finding by the Bankruptcy Court.

In January 1982, one of the corporations controlled by the Petitioners obtained almost $9 million from KB Business Credit, Inc. ("KBBC"), and disbursed these funds to several

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6 *See Bankers Trust v. Rhoades*, 859 F.2d at 1099; App. 5a-6a; *Bankers Trust v. Feldesman*, 648 F. Supp. 17, 22-23 (S.D.N.Y. 1987); App. 45a-46a.

other corporations controlled by Petitioners.[7] When KBBC was not repaid, it sued Braten, Rhoades and several of their corporations. Braten and Rhoades settled the lawsuit (and avoided personal liability) by having BAC, for little or no consideration, convey the stock of Brookfield Clothes to another of Petitioners' corporations, which then pledged the stock to KBBC.

At or about that time, Brookfield Clothes itself was stripped and its assets disbursed to the Petitioners. Brookfield Clothes had been phenomenally successful, had paid out millions of dollars to the other Petitioners, and still had a substantial equity in early 1982. However, shortly after the Bankruptcy Court rendered its revocation decision in June 1982, Brookfield Clothes was found to be insolvent.[8] Petitioners had taken no chances that BAC's creditors would be able to reach Brookfield Clothes or its assets; they conveyed away Brookfield Clothes and stripped it of its assets. They also further stripped BAC of other assets it had.[9]

Bankers commenced this RICO action in August 1982, just shortly after discovering this latest in the pattern of Petitioners' predicate acts of racketeering.

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7 In addition, KBBC had advanced $100,000,000 to Braten, by wiring the money to a South Carolina bank account in the name of "Braxton Ltd.", an apparently nonexistent corporation.

8 On September 1, 1982, Brookfield Clothes consented to a petition for relief under Chapter 11 of the Bankruptcy Code. 82 B. 11741 (Bktcy. S.D.N.Y.). Papers later filed in that proceeding indicated that some of Brookfield Clothes' assets had recently been sold to a partnership, one of whose members was the president of KBBC when it advanced millions of dollars to BAC's affiliates.

9 *See Bankers Trust v. Rhoades*, 859 F.2d at 1099; App. 6a; *Bankers Trust v. Feldesman*, 648 F. Supp. at 22; App. 45a. Millions of dollars apparently went to a real estate limited partnership of which Soifer and Braten are members. BAC now claims that its principal "creditor" is Rhoades, who claims to be owed $3.1 million for legal fees.

SUMMARY OF ARGUMENT

To the extent Petitioners seek review of the Second Circuit's conclusion that Bankers has standing to assert its claim for damages caused by Petitioners' bankruptcy frauds,[10] their Petitions are moot. The Second Circuit held that Bankers' "loss of legitimate debt" claim was premature and affirmed dismissal (without prejudice) of that part of Bankers' complaint.

In any event, the Second Circuit correctly found that Bankers was injured in its business or property by Petitioners' bankruptcy frauds and therefore had standing to sue. It would be contrary to the purpose of RICO to hold that a corporation that was the tool of and is still controlled by the individual racketeers is the only party that has standing to assert a claim based on Bankers' injury. No reported case has so held, and there is no conflict requiring resolution by this Court.

The Second Circuit also correctly held that Bankers' claim is not time-barred. Petitioners argue that the Second Circuit's accrual rule differs from that of the Third Circuit, but under either rule Bankers' claim was timely. Resolution of any conflict would therefore serve no purpose here.

Moreover, there is no conflict concerning petitioners' real grievance, namely, the Second Circuit's application of the "speculative damages" rule of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The Second Circuit correctly followed *Zenith* in holding that the injury Bankers suffered, if any, cannot be determined until after the bankruptcy proceedings are over, and that Bankers' "loss of legitimate debt" claim has therefore not yet accrued.

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10 As used herein, "bankruptcy frauds" refers to the RICO predicate acts of "fraud in connection with a case under title 11." 18 U.S.C. § 1961(1)(D); App. 77a.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION THAT BANKERS HAS STANDING TO ASSERT ITS RICO CLAIMS DOES NOT WARRANT REVIEW BY THIS COURT

A. The Second Circuit's Decision Is Consistent With This Court's Precedent

Rather than being a deviant ruling requiring this Court's review, the Second Circuit's decision that Bankers has standing is plainly consistent with this Court's existing precedents.

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court warned against creating standing requirements not expressly included in the RICO statute:

> "[T]he plaintiff . . . has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. . . .
>
> *But the statute requires no more than this.* . . ." [Emphasis added]

Id. at 496-97. The Court repeated this warning when it commented that early RICO-like bills offered to amend the Sherman Act had failed in Congress because they would have hampered plaintiffs with "strict requirements on questions such as 'standing to sue.' " *Id.* at 498.[11]

The Second Circuit's decision follows the Supreme Court's directive in *Sedima*. 859 F.2d at 1101; App. 10-11a. The Second

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11 *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987) (Soifer Petition, p. 5 n.3), is not to the contrary. There, the Court held that Congress intended, by narrowly describing as a predicate offense "fraud in the sale of securities", to incorporate into RICO claims based on Rule 10b-5 violations the standing requirements applied to such violations. But the Fourth Circuit distinguished RICO cases involving predicate acts of bankruptcy fraud (such as the case at bar), noting that, "In contrast, Congress did use the broader language 'any offense involving fraud connected with a case under title 11 [bankruptcy]' in the same part of the RICO statute." *Id.* at 152.

Circuit's decision is also consistent with *Haroco v. American Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir.), *aff'd per curiam*, 473 U.S. 606 (1985). In *Haroco*, the RICO claim was based solely upon predicate acts of mail fraud, for which there is no private right of action. Nevertheless, *Haroco* upheld plaintiff's right to sue under RICO for the damages caused by the mail fraud, because the RICO statute expressly creates a remedy for a RICO violation, even if it is based exclusively on a pattern of mail frauds.

Here, too, regardless of whether or not Bankers would have had standing, absent RICO, to sue for damages caused by the underlying bankruptcy frauds, Bankers has standing to sue for recovery of its damages caused by Petitioners' violations of RICO, even where such violation is predicated in part upon a pattern of "fraud connected with a case under title 11 [bankruptcy]." 18 U.S.C. § 1961(1)(D); App. 77a.[12]

B. There is No Conflict Among The Circuits On The Question Presented

Contrary to Petitioners' argument, no Court of Appeals has held that a creditor of a bankrupt corporation, who is injured by RICO violations comprised of a pattern including bankruptcy frauds, lacks standing under RICO to sue the wrongdoers who are still in control of the bankrupt corporation. Since there is no disagreement among the Circuits as to the issue presented, and since the Second Circuit's decision was correct, there is no reason for this Court to issue a writ of certiorari.

Petitioners rely on inapposite authority in arguing otherwise. First, Petitioners refer (Soifer Petition, pp. 5-7) to shareholder and union member suits which hold that shareholders cannot

12 "Bankruptcy fraud" is not, *per se* the gravamen of Bankers' "loss of legitimate debt" claim. Rather, it merely helps define the racketeering activity that is proscribed by RICO and that caused Bankers' injury. *Cf. Morley v. Cohen*, 610 F. Supp. 798, 808 (D. Md. 1985), *quoting United States v. Forsyth*, 560 F.2d 1127, 1135 and n.11 (3d Cir. 1977) [citations omitted] ("RICO . . . was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity").

sue individually to recover for injuries suffered by their corporations, and union members cannot sue individually for injuries suffered by their unions.[13] But, as the Second Circuit correctly noted (859 F.2d at 1101; App. 10a), Bankers is a *creditor* of BAC, not its shareholder or otherwise in control of BAC. Thus, the corporate law doctrine of shareholder derivative (and union member) suits does not apply, and shareholder derivative cases are not applicable.[14]

Petitioners next refer (Soifer Petition, pp. 7-10) to cases holding that creditors may not bring their own actions during the pendency of the debtor's bankruptcy proceeding. However, none of these cases is a RICO case. None of these cases considered the policies and purposes of RICO (*see* Point I(C) *infra*), and none of them dealt with the issue decided by the Second Circuit below.[15]

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13 The union member cases were decided by analogy to shareholder derivative principles.

14 The shareholder derivative cases recognize that, in such cases, the injury to be redressed is to the corporation; the shareholder's injury is merely derivative (*i.e.*, the value of the shareholder's shares is diminished). Here, by contrast, the Second Circuit correctly recognized that Bankers is suing for its own direct injury. 859 F.2d at 1101; App. 10a.

15 Those cases are distinguishable in other respects as well. For example, in *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), plaintiff's complaint sought almost precisely the same relief as was sought by the bankruptcy trustee (*id.* at 1341). Here, Bankers' claim is not similar to any outstanding claim by BAC or its (*non-existent*) trustee; indeed, no one else has asserted a claim like Bankers' against these defendants. *In re S. I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987), and *In re Mortgage America*, 714 F.2d 1266 (5th Cir. 1983), both involved violations of state laws designed to protect the debtors—not violations of RICO in which the debtor participated and which were designed to subvert the bankruptcy process, as is the case here. *In Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129 (2d Cir. 1984), the plaintiff *expressly* brought the case in the name of the *debtor* and to vindicate the *debtor's* rights, in his capacity as a shareholder. Here, Banker has not attempted to assert BAC's rights, but its own. And in *Gochenour v. Cleveland Terminals Building Co.*, 118 F.2d 89 (6th Cir. 1941), the creditors of a bankrupt company were essentially trying to structure a reorganization through litigation, which plainly runs afoul of the Bankruptcy Court's jurisdiction—and which, just as plainly, Bankers here is not trying to do.

Finally, Petitioners argue (Soifer Petition, pp. 10-12) that the Fifth and Seventh Circuits would bar Bankers' claim, and so are in conflict with the Second Circuit. Petitioners are incorrect.

First, the Seventh Circuit is not in conflict with the Second Circuit. To the contrary, in *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648 (7th Cir. 1984), a bankrupt company and two of its creditors sued the persons who bankrupted the company and made the creditors unable to recover on the credit they extended. In upholding the individual creditors' right to sue under RICO in their own behalf, the Seventh Circuit declared

> "If as we believe the complaint adequately alleges a 'pattern of racketeering activity' . . . directed against Sutliff, Inc. [the bankrupt] *it does so even more clearly with respect to the other plaintiffs* [the individual creditors]."

Id. at 653 [emphasis added].

Petitioners ignore *Sutliff*. They rely instead on *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985) and several district court cases. In *Carter*, taxpayers sued under RICO, claiming that defendants had corruptly obtained lowered property assessments for tax purposes, thereby causing plaintiffs' taxes to rise. The Seventh Circuit dismissed on standing grounds, based on the antitrust "passing on" doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).[16] Nevertheless, the Seventh Circuit pointed out that if the county were under the control of the wrongdoers, the taxpayers *would* have standing:

> "Doubtless indirectly injured parties could come under RICO when they show that the directly injured party was under the continuing control or influence of the defendant or his henchman."

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16 This borrowing of antitrust standing principles may have been error. *See Sedima, supra*, 473 U.S. at 498-99 ("In borrowing its 'racketeering injury' requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid").

777 F.2d at 1178. Here, where there is no trustee and defendants still control BAC, *Carter* supports the result below. Similarly, in *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576 (N.D. Ill. 1986) (Soifer Petition, p. 12 n.12), although the district court dismissed a RICO claim brought by a creditor against corporate insiders who looted corporate assets, the Court expressly stated that this holding would *not* apply "where the RICO victim is a wrongdoer as well" (*id.* at 580, citing *Carter*, 777 F.2d at 1176). Significantly, in *Dana Molded*,—and *unlike* the case here—there already was a trustee in charge who was not claimed to be under defendants' control.

Equally important, one reason stated for the Seventh Circuit's decision in *Carter v. Berger* was to "concentrate the right of recovery" so as "to promote the goal of deterrence." 777 F.2d at 1176. Here, the rule urged by Petitioners would have the exact *opposite* effect. In view of the facts here—including defendants' mockery of the legitimate bankruptcy process—it is clear that *no* "deterrence" would be afforded if BAC, the tool of their RICO enterprise, were made the sole party with standing to assert Bankers' RICO claims.

The two additional district court cases cited by Petitioners (Soifer Petition, pp. 9, 10) are not to the contrary. Thus, in *Barnett v. Stern*, No. 85 C 144, 1988 U.S. Dist. LEXIS 13445 (N.D. Ill., Nov. 30, 1988), as in *Dana Molded*, there already was an independent trustee; while in *Mitsubishi Electric Sales America, Inc. v. Higgins*, No. 88 C 3772, 1988 U.S. Dist. LEXIS 12898 (N.D. Ill. Nov. 10, 1988), there was no allegation that the bankrupt company was still controlled by the defendant racketeers.[17]

Here, BAC is conceded to be under the continuing control of the defendants. *Bankers Trust Co. v. Feldesman*, 676 F. Supp. 495, 503 (S.D.N.Y. 1987); App. 36a. Thus, the decision of the

17 In any event, these district court cases do not give rise to a conflict among the Circuits. To the extent these cases do not follow the Seventh Circuit's decision in *Sutliff v. Donovan*, *supra*, there is an intra-Circuit conflict that should be left to the Seventh Circuit to resolve.

Second Circuit below is consistent with those in the Seventh Circuit.[18]

National Enterprises, Inc. v. Mellon Financial Services Corp. No. 7, 847 F.2d 251 (5th Cir. 1988) (Soifer Petition, pp. 10-11), is even more inapposite to the case at bar. In *National Enterprises*, there was no bankruptcy fraud, no deliberate bankrupting of a business to defraud creditors, and no breakdown or subversion of the bankruptcy process to defeat creditors' claims, or an attempt to specifically victimize the plaintiff—all of which are present here. Instead, there was only an alleged kickback scheme that reduced the company's assets. Also unlike the case at bar, the malefactors there were not in control of the company—its trustee in bankruptcy was pursuing a RICO claim based on exactly the same allegations as the plaintiff. *Id.* at 252 n.1. Thus, there is no significant inconsistency between the *National Enterprise* decision and the decision of the Court below requiring resolution by this Court.

Despite their concession that BAC is still in Petitioner's control and despite the language of *Carter* and *Dana Molded*, *supra*, Petitioners argue (Soifer Petition, p. 10 n.7) that Bankers lacks standing. To defuse the issue of their own control of BAC, defendants speculate that Bankers could have a trustee in bankruptcy appointed (supplanting their control of BAC), and then try either to persuade the trustee to bring this case on behalf of BAC or to obtain a ruling that the claim was abandoned so that Bankers could start this case up again.

In the 15-year history of the BAC (and now Brookfield) bankruptcies, defendants have held Bankers at bay by adroit manipulation of bankruptcy court procedure. The trustee maneuver that they now present is of a piece with their previous

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18 *See also*, *Cenco v. Seidman & Seidman*, 686 F.2d 449, 454-55 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) (the fact that some of the individual wrongdoers could benefit from a recovery on a RICO claim brought by or on behalf of BAC—defendants Braten and Soifer are the shareholders of BAC and BAC also asserts that defendant Rhoades has a $3.1 million "claim" against it—would render such a recovery "perverse from the standpoint of compensating the victims of wrongdoing").

devices. It would gut the remedial purpose of RICO to send Bankers, the injured party, back for another futile lap around the bankruptcy court—which Petitioners have already defrauded.

Furthermore, the creditors of the estate other than Bankers are all well aware of the 1974–1976 and 1982 bankruptcy frauds alleged herein. Bankers' RICO claim has been the subject of five reported judicial decisions. Yet no creditor has shown any interest in having the estate pursue this case. After years of inaction, there is no reason to think that a trustee supported by BAC's creditors would prosecute this case. Moreover, even if BAC's hypothetical future trustee could or would state a claim, he might yet be barred from doing so by the statute of limitations.[19]

In addition, Petitioners' argument leads to the anomalous result that even BAC's theoretical trustee-to-be would not have full power to pursue BAC's injury. The alleged RICO pattern would include the stripping of the assets of Brookfield Clothes, itself now in bankruptcy. Under Petitioner's argument, only *Brookfield's* bankruptcy trustee would have standing to sue for recovery of Brookfield's assets. (Brookfield's trustee has shown no desire to do so.) Bankers' claims would thus be swallowed up in a labyrinth of bankruptcies created by defendants—*precisely the result that RICO was enacted to avoid* (*see* Point I(C), *infra*).

Petitioners' argument would thus produce the untenable result that there is a clear violation, a clear injury, clear causation, and yet there is no one who will be able to secure a remedy

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19 Defendants would no doubt assert that any claim now brought by a trustee for events that took place in 1982 and earlier are time-barred. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987) (four-year limitation period applies). *Compare* 11 U.S.C. § 29e (1898 Bankruptcy Act § 11e) (trustee has *two* years from date of adjudication to bring action in behalf of estate); 11 U.S.C. § 742 (Act § 342) (debtor in possession has "all the powers of a trustee"); and 11 U.S.C. § 778(a)(2) (Act § 378(a)(2)) (apparently indicating that filing of petition, under § 322, Chapter XI, is to be treated as a decree of adjudication).

for Bankers' very real injury. There is nothing in RICO, in the 1898 Bankruptcy Act, or in any case, that warrants such a bizarre outcome—which the Second Circuit correctly avoided.

C. There Is No Conflict Here Between RICO And The Bankruptcy Laws Requiring Resolution By This Court

RICO provides (18 U.S.C. § 1961(1)(D)) that "any offense involving fraud connected with a case under title 11 [the bankruptcy statute]" is a predicate act which can be part of the pattern giving rise to liability. Congress clearly anticipated that RICO claims would be brought to redress injuries caused by a pattern including bankruptcy frauds. Furthermore, as the Second Circuit has noted elsewhere, the mere fact that certain of the facts pleaded by Bankers could also support a claim by the debtor or its trustee, does not deprive Bankers of standing to assert its own claims. *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir.), *cert. denied*, 479 U.S. 950 (1986).[20]

Obviously, Congress enacted RICO with full awareness of the 1898 Bankruptcy Act (under which BAC filed its Chapter XI petition). Yet Congress did not limit standing to sue for RICO claims based on "fraud connected with a case under Title 11" to the bankrupt or its trustee. Rather, RICO's remedy was granted to "*any* person injured" by the RICO violation (18 U.S.C. § 1964(c); App. 87a [emphasis added])—and Congress further admonished that "RICO is to be read broadly." *Sedima*, 473 U.S. at 497.[21]

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20 Petitioners' attempt (Soifer Petition, p. 10) to distinguish *Cumberland Oil* misses the point. In *Cumberland Oil*, no less so than here (and perhaps more so), the *injury* was caused by the *same* removal of assets that presumably injured all of the bankrupts' creditors; yet plaintiff's individual claim was allowed to proceed.

21 Eight years after RICO was enacted, the bankruptcy laws were recodified by the Bankruptcy Reform Act of 1978 (which, however, does not govern BAC's bankruptcy; *see* P.L. 95-598 § 403(a), 92 Stat. 2549, making the Bankruptcy Code inapplicable to pre-Code cases.) The new Bankruptcy Code provides no standing limitation on RICO claims brought by persons injured by bankruptcy frauds.

Indeed, Congress' concern with the injury caused to creditors by bankruptcy fraud was a major reason it enacted RICO. *See* Criminal Laws and Procedures, Hearing on S. 2187, 2188, 2189, 2190 and 2578 before the Subcommittee on the Judiciary, 89th Cong. 2d Sess. 204 (1966):

> ". . . [D]eliberate bankruptcy is an alarming new nationwide phenomenon. Crime syndicates install ostensibly honest front men in business . . . , then loot and legally bankrupt the firm . . . But since these manipulations are almost impossible to prove, creditors are left holding the bag. . . .
>
> . . . It is estimated that lone operators copying Mafia techniques, bankrupt at least a thousand smaller businesses each year."

By creating a private right of action for persons injured by a RICO violation, Congress granted individual creditors standing to sue under RICO for the subversion and misuse of the bankruptcy laws like that alleged in this case.

Petitioners here are accused of precisely the "bust-out" bankrupting of a business (here, BAC and Brookfield), which so concerned Congress. Particularly here, where repeated bankruptcy frauds have made a mockery of Bankers' conventional bankruptcy remedies, the Congressional intent behind RICO can only be vindicated by according Bankers standing. To give the bankrupted tool of the racketeering enterprise—which here is still controlled by the racketeers—sole standing to act would defeat the clear Congressional intent behind RICO.

The Second Circuit gave proper weight both to the bankruptcy law and to RICO. The Second Circuit found that Bankers would have standing to sue under RICO for its "loss of legitimate debt" injury—while delaying Bankers' right to pursue that claim until Bankers' injury could be ascertained as a result of the bankruptcy proceedings—thereby avoiding even a potential conflict with bankruptcy law policies.

There is no conflict between RICO and the bankruptcy law under the facts of this case. In the more-than six (6) years that

this action has been pending, no effort has been made by the Bankruptcy Court or any creditor of BAC to stay this action or have BAC take it over—only the defendants (Petitioners) here want that to happen. *Cf. Teledyne Industries v. Eon Corp.*, 401 F. Supp. 729, 734 (S.D.N.Y.), *aff'd on opinion below*, 546 F.2d 495 (2d Cir. 1976) (court noting, in allowing individual creditor's suit to proceed against bankrupt's officers, that bankruptcy judge had refused to enjoin said action). No effort has been made by any creditor to appoint a trustee or to pursue the claims raised by Bankers. Indeed, there has simply been no interest on the part of *anyone*, other than Bankers, to pursue this claim since commission of the first frauds in 1974–1976.

For these reasons, nothing in either RICO or the Bankruptcy Act deprives Bankers of its right to sue for its injuries caused by Petitioner's violations of RICO. The supposed need to protect BAC's bankruptcy proceeding from Bankers' RICO action is an illusion concocted by the three Petitioner-defendants, who are still in control of BAC, for the obvious purpose of preventing Bankers from recovering its due.

II.

REVIEW IS NOT WARRANTED HERE, SINCE BANKERS' CLAIMS ARE TIMELY UNDER EITHER OF THE ALLEGEDLY CONFLICTING APPROACHES

A. Bankers' Claims Are Timely Under Either Accrual Rule

Petitioners' argument (Soifer Petition, Point II(A),(B)), that there is a conflict between the Second and Third Circuits, even if correct, is academic here; resolution of that conflict cannot benefit Petitioners.

As the Petitioners concede (Soifer Petition, Point II(A),(B)), the rule of accrual adopted by the Third Circuit in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), is more open-ended than the rule adopted by the Second Circuit below. Under the Third Circuit's rule, none of the claims here would be time-barred, since at least some predicate acts (the

1982 bankruptcy frauds) were committed within four years of the commencement of this suit.[22]

Petitioners further assert (Soifer Petition, p. 21) that ". . . the Second Circuit's rule of separate accrual appears far more consistent with the principles of *Wilson v. Garcia* [471 U.S. 261 (1985)] than [does] *Keystone*." *Accord*, *Statefarm Mutual Automobile Insur. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987). Obviously, then, Petitioners are not aggrieved by the Second Circuit's rule. If any party here should wish to urge that the Third Circuit's rule should be adopted, it would be Bankers.

B. Review Is Not Warranted Here, Where The Second Circuit Properly Applied The Rule in *Zenith v. Hazeltine* And There Is No Conflict Between The Circuits

What petitioners actually complain of is the Second Circuit's application of the speculative damages rule of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), to the accrual of Bankers' claim to recover damages for loss of its debt. Petitioners do not point to any Circuit Court reaching a contrary conclusion, and Bankers is unaware of any. Consequently, there is no conflict among the Circuits requiring resolution by this Court.

Furthermore, the Second Circuit's application of the speculative damages rule was unexceptional, and certainly consistent with well-established principles. The Second Circuit concluded, quite simply, that if Bankers were ultimately to recover its legitimate debt in the bankruptcy proceeding, it would have no recoverable injury—or, to put it more broadly, Bankers' right to sue for loss of debt should await a resolution of the existence

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22 Contrary to Petitioners' statement (Soifer Petition, p. 21; *cf.* 863 F.2d at 1129 n.5), the Third Circuit's accrual standard is clearly different from the one adopted by the District Court below: The District Court below held that the claim accrued when Bankers learned of the last predicate act *causing injury* (648 F. Supp. at 36; App. 72a); the Third Circuit held that the claim accrued when plaintiff learned of the last predicate act in the pattern—but "the last predicate act *need not have caused injury* to the plaintiff." 863 F.2d at 1130 [emphasis added].

and amount of such damages. Thus, the Second Circuit merely recognized the impossibility of determining what, if any, loss of legitimate debt injury Bankers suffered by reason of the bankruptcy frauds, until the termination of the bankruptcy proceedings. 859 F.2d at 1105-06; App. 21a-22a.[23]

Petitioners cannot persuasively argue that the *Hazeltine* speculative damages rule, originally applied in antitrust cases, has no application to RICO cases. This Court has found the analogy between RICO and the Clayton Act to be compelling. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 107 S. Ct. 2759, 2764-67 (1987). As the Second Circuit noted,

> "we have little trouble in concluding that the same statute which lends its four-year limitation period to civil RICO actions should also lend its rule of accrual in determining when the four year period begins to run."

859 F.2d at 1104; App. 17a. And just as *Hazeltine*'s speculative damages rule is necessitated in part by "the strong congressional policy in favor of antitrust enforcement by private damage suits," *Fitzgerald v. Seamans*, 553 F.2d 220, 227 (D.C. Cir. 1977) (Soifer Petition, p. 26), so the Congressional policy in favor of RICO enforcement by private damage suits is equally strong here. *See* 18 U.S.C. § 1964(c) (App. 87a-88a); *Malley-Duff*, *supra*, 107 S. Ct. at 2764-65, where this Court pointed out, *inter alia*, that

> "Both RICO and the Clayton act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of 'private attorneys general' on a seri-

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23 Of course, if the Second Circuit erred in applying the *Hazeltine* rule, then Bankers should be free to sue now for its "loss of legitimate debt" claim, since Bankers has standing to recover for its injury (Point 1, *supra*), and any feared disruption of the bankruptcy proceedings is (a) purely speculative, (b) capable of being controlled by the bankruptcy and district courts if they deem it necessary, and (c) extremely unlikely anyway in view of the demonstrated indifference of the bankruptcy court and BAC's other creditors to Bankers' RICO claims herein.

> ous national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury 'in his business or property by reason of' a violation".

In an attempt to avoid the *Hazeltine* speculative damages rule, Petitioners mischaracterize Bankers' claim. They argue (Soifer Petition, p. 28) that Bankers' "loss of legitimate debt" claim accrued in 1976, when Bankers' discovered Petitioners' *first* set of bankruptcy frauds. Petitioner's argument is wrong.

First, as recognized by the Second Circuit (859 F.2d at 1105-06; App. 21a), Bankers suffered a separate and distinct injury from Petitioners' second series of frauds in 1982. Those frauds deprived Bankers of such return as would have been available in 1982 had BAC not been illegally stripped of its assets, and also had the effect of depriving Bankers of its conventional bankruptcy law remedies. Because Bankers succeeded in proving Petitioners' initial (1974-74) bankruptcy frauds, the Bankruptcy Court revoked its 1976 confirmation of BAC's fraudulently procured arrangement. This revocation restored BAC's bankruptcy so that, had BAC and Brookfield Clothes not been stripped by Petitioner's subsequent frauds, Bankers would have been able to recover its debt.

Thus, there was a new injury, and a new claim accrued, in 1982.

Furthermore, Bankers could also still sue for Petitioners' 1978 bribery and 1982 bankruptcy frauds: At no time did Petitioners gain a prescriptive license to continue to violate RICO by reason of their prior misconduct. Under *no* circumstances, then, could Bankers' RICO claim be time-barred.

CONCLUSION

The separate Petitions of Herman Soifer, and of Daniel Rhoades and Milton Braten, for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, should be denied.

Dated: March 10, 1989
New York, New York

Respectfully submitted,

DAVID RABINOWITZ
(Counsel of Record)
DAVID B. PICKER

MOSES & SINGER
1271 Avenue of the Americas
New York, New York 10020
(212) 246-3700

Attorneys for Respondent
Bankers Trust Company

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No. 88-1337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

JOEL W. STERNMAN
(*Counsel of Record*)

AUDRY WEINTROB
ROSENMAN & COLIN
575 Madison Avenue
New York, New York 10022
(212) 940-8800

Attorneys for Petitioner
Herman Soifer

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PETITIONER'S REPLY BRIEF

I. BAC, AS DEBTOR IN POSSESSION, IS SUBJECT TO THE PERVASIVE CONTROL OF THE BANKRUPTCY COURT AND CANNOT PROPERLY BE VIEWED AS CONTROLLED BY THE ALLEGED WRONGDOERS

The foundation of Bankers' efforts to support its standing to assert a creditor's RICO claim rests on a critically flawed premise. In Bankers' view, because no trustee has been appointed, the alleged wrongdoers from whom it seeks to recover remain in control of BAC.

Nearly 50 years ago, this Court made clear that a debtor in possession becomes subject to the pervasive control of the bankruptcy court and that, as a result, it is no longer free to act, as it could have acted before the filing of its petition, in the self-interest of its management or equity holders. Instead, a debtor in possession must act consistently with its fiduciary obligations to its creditors.

As stated in *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U.S. 106, 125 (1939), a company which "invokes the aid" of the bankruptcy courts "assumes all of the consequences which flow from that jurisdiction". While former management may continue to operate the company's business, it does so subject to conditions prescribed by the bankruptcy court:

> Thus, while the property remains in the hands of the court, as it does until dismissal or final decree on confirmation, the debtor, though left in possession by the judge, does not operate it, as it did before the filing of the petition, unfettered and without restraint. The control of the court is then pervasive. . . . The right to remain in unmolested dominion and control over the property was necessarily waived or abandoned on invoking the jurisdiction of the federal courts in these proceedings. When that jurisdiction attached, the court rather than the shareholders was in control. . . . 308 U.S. at 125-26, 127.

See also Pepper v. Litton, 308 U.S. 295, 307 (1939).

These same principles are reflected in section 342 of the former Bankruptcy Act, 11 U.S.C. § 742 (1976):

> Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this title, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe.[1]

See generally 8 *Collier on Bankruptcy* ¶ 6.32[1] at 929 (14th ed. 1978):

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1 BAC's bankruptcy proceeding was commenced prior to October 1979. As a result, it is subject to the former Bankruptcy Act. *See* Pub. L. 95-598, § 403(a), 92 Stat. 2549 at 2683 (1978). The present Bankruptcy Code has not modified the principles governing the duties of a debtor in possession. *See* 11 U.S.C. § 1107(a).

> [A] debtor in possession, in addition to his duty to exercise his powers for the benefit of creditors, is under a duty to preserve and protect his title and to maintain his possession for the benefit of creditors.

In *Commodity Futures Trading Comm. v. Weintraub*, 471 U.S. 343, 355 (1985), this Court described the obligations imposed on a debtor in possession as follows:

> [B]ankruptcy causes fundamental changes in the nature of corporate relationships. One of the painful facts of bankruptcy is that the interests of shareholders become subjected to the interests of creditors. . . .
>
> [I]f a debtor remains in possession—that is, if a trustee is not appointed—the debtor's directors bear essentially the fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession. *Wolf v. Weinstein*, 372 U.S. 633, 649-52 (1963). Indeed, the willingness of courts to leave debtors in possession "is premised upon an assumption that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee." *Id.*, at 651.

See also Stein v. United Artists Corp., 691 F.2d 885, 892 (9th Cir. 1982):

> The debtor in possession is strictly supervised by the bankruptcy court, and his actions, including abandonment, must be approved. The bankrupt does not act in his own interests until he reverts to his former status upon discharge and confirmation of the plan. The extent of the fiduciary duties should not vary with the identity of the one who performs that role.

Against this backdrop, Bankers' attempt to cast BAC as the alter ego of the alleged wrongdoers must be rejected. Because it is a debtor in possession subject to the pervasive control of the bankruptcy court, BAC cannot, as a matter of law, be viewed as an entity "still controlled by the individual racketeers" and a

"tool of the racketeering enterprise—which here is still controlled by the racketeers". Bankers' Br. at 7, 16.

Moreover, no one has "conceded" that BAC is "under the continuing control" of the alleged wrongdoers. Bankers' Br. at 12. Surprisingly, Bankers claims to find support for this alleged concession in the District Court's 1987 decision rejecting Bankers' attempt to assert a creditor's RICO claim. *Id.*, citing 676 F. Supp. at 503; App. 36a. However, after referring to Bankers' contention that BAC's daily affairs are managed by the alleged wrongdoers, the District Court stated as follows:

> Nevertheless, BAC's reorganization is still pending before the bankruptcy court. Consequently, Bankers can move the bankruptcy court to appoint a trustee. This would enable the trustee to sue to recover the misappropriated assets on behalf of BAC and all of BAC's creditors, thereby ensuring an equitable distribution. If the trustee fails to bring such an action, then Bankers could treat the claim as abandoned and could bring an action on its own behalf without threatening the principles underlying the Bankruptcy Code. *See Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129, 131 (2d Cir. 1984). As long as the bankruptcy case is open and Bankers is able to recover on its claim through the process of equitable distribution, however, a suit under RICO against BAC's corporate officers is inappropriate. 676 F. Supp. at 503; App. 36a-37a.

In any event, even if BAC was under the control of the alleged wrongdoers, Bankers still could not pursue its loss of a legitimate debt claim without authorization from the bankruptcy court. As noted in the Petition (at 10 n. 7), individual creditor claims must, in the first instance, be pursued through the bankruptcy court. The situation here parallels that which arises when creditors attempt to pursue claims they believe have been abandoned by a trustee. Absent bankruptcy court authorization, those attempts will be rejected. *See*, *Dallas Cabana, Inc. v. Hyatt Corp.*, 441 F.2d 865, 868 (5th Cir. 1971):

> The failure of the trustee to assert a cause of action against the appellees in this case is not sufficient to authorize this

> court to hold that the action has been abandoned and that, therefore, this appellant has a right to maintain it. The remedy of the appellant is to petition the bankruptcy court to compel the trustee to bring suit or to authorize the bankrupt to sue or to make such disposition as appears to be appropriate in the circumstances and under the facts presented to the court. Without such authorization or clear manifestation of the trustee to abandon the claim, or some other disposition as the lower court may deem appropriate, appellant may not maintain this cause of action.

See also Nebraska State Bank v. Jones, 846 F.2d 477, 478 (8th Cir. 1988) (*per curiam*):

> Where no trustee has been appointed and the debtor in possession has not exercised its avoidance powers, a dissatisfied creditor has several options:
>
> > the creditor may move to replace the debtor-in-possession with a Chapter 11 trustee; or to convert the Chapter 11 case to one under Chapter 7; move to dismiss the Chapter 11 case; or petition the court to compel the debtor-in-possession to act or to gain court permission to institute the action itself.
>
> (Citation omitted). Appellant failed to pursue any of these options; we will not assume, as appellant does, the futility of doing so.

Bankers cannot excuse its failure to seek relief from the bankruptcy court by references to unspecified "adroit manipulation of the Bankruptcy Court procedure" and acts characterized as having "made a mockery of Bankers' conventional bankruptcy remedies." Bankers' Br. at 13, 16. Its arrogant refusal to seek relief from the bankruptcy court is inexcusable.[2]

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2 *See* 566 F. Supp. at 1236, 1242 n. 10, where, in dismissing Bankers' original complaint in 1983, the District Court referred to but did not

Bankers' ill-conceived theory, under which the debtor in possession and the pre-filing debtor are equated, must be rejected. In its place, BAC, as debtor in possession, should properly be viewed as a representative of all creditor interests, including Bankers, obligated to fulfill fiduciary responsibilities and subject to the control of the bankruptcy court. Viewed in this light, BAC as debtor in possession has the same duties and responsibilities as a bankruptcy trustee. It also has the exclusive right to pursue or ignore claims such as Bankers' loss of a legitimate debt claim unless Bankers can persuade the bankruptcy court to order otherwise.

Practically all of Bankers' distinctions of the cases relied on by petitioner derive from the erroneous premise that, because no trustee has been appointed, BAC remains under the control of the alleged wrongdoers. *See, e.g.*, Bankers' Br. at 11-13, discussing *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576 (N.D. Ill. 1986) and *Barnett v. Stern*, 93 B.R. 962 (N.D. Ill. 1988) (distinction based on trustees having been appointed); *Mitsubishi Electric Sales America Inc. v. Higgins*, 1988 WL 124756 (N.D. Ill. 1988) (distinction based on absence of allegation that defendants controlled the debtor); *National Enterprises Inc. v. Mellon Fin. Serv. Corp. No. 7*, 847 F.2d 251 (5th Cir. 1988) (distinction based on trustee's pursuit of claims against same parties).

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reach petitioner's argument that Bankers' claim could only be asserted in the BAC bankruptcy proceeding. Petitioner continued its challenge to Bankers' standing in opposing Bankers' 1984 petition for the issuance of a writ of certiorari following the Second Circuit's affirmance of that dismissal. *See* Brief of Respondent Herman Soifer, filed with this Court in November 1984 (No. 84-657), at 24. Since Bankers became aware of petitioner's challenge to its standing in 1983, it has actively participated in the BAC bankruptcy proceeding. *See, e.g., In re Braten Apparel Corp.*, 68 B.R. 955 (Bankr. S.D.N.Y. 1987) (adjudicating certain claims of Bankers against the BAC estate). Despite that participation, and the fact that the BAC bankruptcy proceeding remains pending as of this date, Bankers has refused to seek authorization from the bankruptcy court to pursue its loss of a legitimate debt claim.

Nor does the fact that other creditors of BAC have not pursued claims for relief provide any justification for Bankers' cavalier decision to bypass the bankruptcy court for six years—despite its belief that the bankruptcy court would be incapable of preventing further wrongdoing, Bankers cannot create standing otherwise unavailable to it. Its right to redress for any alleged injustice permitted by the bankruptcy court lies in appeals to the District Court and the Court of Appeals.

For nearly seven years, Bankers has refused to pursue rights available to it in the BAC bankruptcy proceeding and has not provided any persuasive explanation for its failure to do so. Its speculation as to the bankruptcy court's impotence cannot justify its disregard of procedures designed to protect the rights of all creditors.

Bankers' citation to RICO's legislative history (Br. at 16) shows that Congress was aware of problems relating to bankruptcy "bust-outs,"[3] not that it intended to authorize individual creditors to circumvent an existing bankruptcy proceeding. Indeed Congress later, in 1978, made a technical amendment to 18 U.S.C. § 1961(1) to conform the language of that section with the language of the new Bankruptcy Code. Bankruptcy Reform Act of 1978, § 314(g), P.L. 95-598, 92 Stat. 2549 at 2677. It is doubtful that Congress, in enacting the new Code (which provided expansive powers for bankruptcy courts), sought to change existing law so radically as to permit creditors to assert individual RICO claims without, at a minimum, securing prior leave of the bankruptcy court.

Nor can Bankers (Br. at 11) find support in *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984), where the Seventh Circuit decided only whether Sutliff and its creditors adequately alleged that they had suffered a RICO injury as a consequence

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3 A "bust-out" is a form of commercial fraud whereby criminals operate an apparently flourishing wholesale business which gradually accumulates a large inventory. Suddenly, the operators dispose of that inventory below market prices, driving the business into bankruptcy and leaving "the mulcted creditors . . . to pick over the meatless carcass of an assetless enterprise." *United States* v. *Crockett*, 534 F.2d 589, 592 (5th Cir. 1976).

of a "bust-out." The issue whether individual creditors had standing and could bypass the bankruptcy court and the rights of other creditors was neither raised by any party nor addressed by that Court.

* * *

Any consideration of Bankers' standing to bring an independent RICO action should begin with the principle that all actions involving a debtor's affairs must, to the greatest degree possible, be concentrated in the hands of a representative authorized by the bankruptcy court to protect the interests of all creditors. The objective of all bankruptcy law is the fair and equitable distribution of a debtor's assets for the benefit of its creditors, as well as orderly administration of its affairs.

In the circumstances here, Bankers may not bring an independent RICO action without necessarily disrupting the administration of the BAC estate and prejudicing the rights of BAC's other creditors. The complexity of the bankruptcy issues which surround Bankers' claim should, in the first instance, be addressed in the BAC bankruptcy proceeding. Through consensual plans of reorganization, liquidation, substantive consolidation or other procedures specified by the bankruptcy laws, the relative rights and liabilities of persons interested in the BAC estate can be fairly adjudicated.

II. THE ACCRUAL OF CIVIL RICO CLAIMS AND THE APPLICABILITY OF THE SPECULATIVE DAMAGES EXCEPTION TO RICO PRESENT IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

Bankers does not challenge the express conflict between the decision below and the decision of the Third Circuit in *Keystone Insurance Co.* v. *Houghton*, 863 F.2d 1125 (3d Cir. 1988). Nor does it challenge the importance, previously recognized in *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, ____ U.S. ____, 107 S.Ct. 2759 (1987), of establishing a uniform rule to govern the accrual of civil RICO claims. Instead, it asserts

(Br. at 18) that petitioner was not "aggrieved" by application of the rule of separate accrual.

Bankers' assertion is without any merit. *First*, no authority requires a petitioner to be aggrieved by each aspect of the decision presented for review. *Second*, the rule of separate accrual, when combined with the speculative damages exception, aggrieves petitioner by reviving a time-barred claim and permitting it to remain in a legal limbo for an indeterminate period. Regardless of whether petitioner is aggrieved by application of the rule of separate accrual, the issue presented should be reviewed by this Court.

The absence of a conflict in the Circuits is not dispositive of petitioner's right to certiorari on the applicability of the speculative damages exception to civil RICO actions. That question is an important one which should be settled by this Court.

Bankers fails to point to any reason why a narrow doctrine designed to address a problem in certain types of antitrust litigation rationally should be extended to support some misguided rough justice when RICO and the bankruptcy laws collide. Similarly, even assuming the applicability of the speculative damages exception to RICO, Bankers fails to address how that doctrine could apply in situations similar to those here. As shown in the Petition, courts seeking to determine whether a claim should be dismissed as time-barred may consider whether, if the claim had been bought at an earlier date, it would have been subject to dismissal because of uncertainty that the underlying wrongdoing would in fact have deprived plaintiff of future lost profits. The speculative damages exception was developed to avoid dismissals on limitations grounds of claims based on wrongdoing which, when committed, did not cause any immediate damages.

No parallel exists between the uncertain existence of any future lost profits and situations where a recovery in one action might reduce a recovery in another action. Bankers has known of the maximum amount it could recover since 1976. Uncertainty as to its source—distributions to creditors of the BAC estate or a favorable judgment in this action—is irrelevant and

has nothing to do with the existence of damages and the accrual of claims, the issues addressed by the speculative damages exception.

Statutes of limitation should not lightly be ignored nor should judicially-created doctrines such as the speculative damages exception be extended in an irrational way to compartmentalize in different time-frames claims for relief which have accrued at the same time. Any standing which Bankers had to pursue its loss of a legitimate debt claim has existed since 1976, when that claim accrued. The fact that its pursuit would have interfered with the orderly administration of the BAC estate cannot justify an artificial deferral of its accrual.

The Second Circuit failed to recognize that, whatever the merit to its underlying claims, the passage of time has deprived Bankers of whatever opportunity it may have had to seek relief for its alleged injuries.

For the foregoing reasons, Bankers' arguments in opposition to the petition for a writ of certiorari should be rejected and the the writ should issue.

Dated: New York, New York
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JOEL W. STERNMAN
(Counsel of Record)

AUDRY WEINTROB
ROSENMAN & COLIN
575 Madison Avenue
New York, New York 10022
(212) 940-8800

Attorneys for Petitioner
Herman Soifer